No. 93-397-CSX
Status: GRANTED

Title: Associated Industries of Missouri, et al., Petitioners
v.
Janette M. Lohman, Director of Revenue of Missouri, et al.

Docketed:
September 10, 1993

Court: Supreme Court of Missouri

Counsel for petitioner: Walsh,Thomas Charles

Counsel for respondent: Downing,Don, Bartlett,Alex

Entry	Date	Note	Proceedings and Orders
1	Sep 10 1993	G	Petition for writ of certiorari filed.
3	Oct 12 1993		Order extending time to file response to petition until November 1, 1993.
4	Oct 12 1993		Brief of respondents Missouri Association of Counties, et al. in opposition filed.
5	Oct 29 1993		Brief of respondent Janet Lohman, Director of Revenue in opposition filed.
6	Nov 3 1993		DISTRIBUTED. November 24, 1993 (Page 1)
7	Nov 3 1993	X	Reply brief of petitioners filed.
9	Nov 29 1993		REDISTRIBUTED. December 3, 1993 (Page 16)
10	Dec 6 1993		Petition GRANTED.
			**********
13	Jan 18 1994		Joint appendix filed.
11	Jan 19 1994		Brief of petitioners Associated Industries of Missouri, et al. filed.
12	Jan 21 1994		Brief amicus curiae of Washington Legal Foundation filed.
15	Feb 2 1994		SET FOR ARGUMENT MONDAY, MARCH 28, 1994. (2ND CASE).
17	Feb 3 1994		Order extending time to file brief of respondent on the merits until February 24, 1994.
18	Feb 7 1994		Record filed.
		*	Original record proceedings Supreme Court of Missouri and Circuit Court of Cole County, Missouri (BOX).
19	Feb 10 1994		CIRCULATED.
20	Feb 23 1994	X	Brief of respondent Janet M. Lohman, Director of Revenue filed.
21	Feb 24 1994	X	Brief of respondents DeLong's Incorporated, et al. filed.
22	Feb 24 1994	X	Brief amici curiae of City of St. Louis, et al. filed.
23	Feb 24 1994	X	Brief amici curiae of National Conference of State Legislatures, et al. filed.
24	Feb 24 1994	X	Brief amicus curiae of Multistate Tax Commission filed.
25	Mar 14 1994	X	Reply brief of petitioner filed.

93-397

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue
and
DELONGS, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, AND
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. When a state imposes a statewide use tax upon *inter*state sales at a rate which, in more than 50% of the state's taxing jurisdictions, is higher than the sales tax rate on identical *intra*-state sales, is the resulting discrimination against interstate commerce constitutionally irrelevant merely because in the aggregate the state collects more sales taxes than use taxes?

2. Does *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), validate a state tax scheme which in numerous instances burdens interstate commerce more heavily than intrastate commerce? If so, is *General American* inconsistent with *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and should it be expressly overruled?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

OPINIONS BELOW

The majority and dissenting opinions of the Missouri Supreme Court filed June 29, 1993, are not yet officially reported but are reproduced in Appendix A to this Petition at pages A-1 and A-25, respectively. The unreported Judgment of the Circuit Court of Cole County dated July 15, 1992, is reproduced in Appendix B at A-35.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Supreme Court, en banc, was entered on June 29, 1993. No rehearing was sought. This petition was filed within ninety (90) days of the judgment. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3:

> "The Congress shall have the power . . . "To regulate commerce with foreign nations, and among the several states . . . ."

MISSOURI REVISED STATUTES (1992):

Section 144.020:

> **"Rate of tax.** - 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> > "(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged . . . ."

Section 144.610:

> **"Tax imposed, property subject, who liable.** - 1. A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property . . . in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020."

Section 144.748:

> **"Additional use tax . . .** - 1. In addition to the taxes imposed by section 144.610, there is hereby imposed an additional use tax in the amount of one and one-half percent upon all transactions which are subject to the taxes imposed under sections 144.600 to 144.745."

CONSTITUTION OF MISSOURI (1945, as amended):

> **Section 43(a).** . . . "For the purpose of providing additional monies to be expended and used by the conservation commission, department of conservation . . . an additional sales tax of one-eighth of one percent is hereby levied and imposed . . .; and an additional use tax of one-eighth of one percent is levied and imposed . . . ."
>
> **Section 47(a).** . . . "For the purpose of providing additional monies to be expended and used by the department of natural resources . . . an additional sales tax of one-tenth of one percent is hereby levied and imposed . . .; and an additional use tax of one-tenth of one percent is levied and imposed . . . ."

STATEMENT OF THE CASE

Missouri imposes a state-wide use tax of 5.725% on all goods purchased outside of Missouri but stored, used or consumed in Missouri. Mo. Rev. Stat. §§ 144.610, 144.748 (1992). The state also levies a state-wide sales tax of 4.225% but allows local governments the option of imposing additional local sales taxes. In 841 of the 1573 taxing jurisdictions in Missouri — or 53.5% — the aggregate sales tax imposed on goods purchased within the state is less than 5.725%. Therefore, in those 841 jurisdictions, a resident purchasing an item from a local merchant would

be taxed at a lesser rate than his neighbor who bought the identical item through the mail from a vendor in another state.[1]

Petitioner Associated Industries of Missouri ("AIM") is a not-for-profit corporation operating as a trade association comprised of individuals and organizations engaged in business in Missouri and elsewhere. It was stipulated that AIM's members pay Missouri sales and use taxes on purchases of property made within and without Missouri and that several of AIM's members also collect and remit Missouri use tax on sales made outside of Missouri to purchasers located within Missouri (Stip. ¶4). Petitioner Alumax Foils, Inc. is headquartered in St. Louis and likewise is subject to Missouri sales and use taxes. Alumax currently pays approximately $3,000 per month in Missouri use taxes (Stip. ¶5).[2]

Petitioners sued :he Missouri Director of Revenue in the Circuit Court of Cole County, Missouri, claiming that the state-wide additional 1.5% use tax violates, *inter alia*, the Commerce and Equal Protection Clauses of the United States Constitution because it discriminates against out-of-state sales by imposing a use tax at a greater rate than would be applicable to many in-state

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[1] The statutory scheme creates a state-wide sales tax of 4.225% and a state-wide use tax of 4.225%. The legislature, in § 144.748, mandated an additional use tax of 1.5% on all interstate sales but left it to local option whether to adopt a local sales tax. More than half the local jurisdictions have not adopted a local sales tax or have enacted one of less than 1.5%. Thus it is the uniform additional 1.5% use tax imposed by § 144.748 which creates the disparity between local and interstate sales and which is the target of petitioners' challenge in this case.

[2] Alumax Foils, Inc., is a subsidiary of Alumax Inc. It has no subsidiary corporations that are not wholly owned.

sales of identical items via the sales tax.[3] The Circuit Court of Cole County rejected the constitutional challenge and entered judgment for the defendant Director (A-35). On direct appeal, the Missouri Supreme Court affirmed (A-1), Chief Justice Robertson dissenting (A-25).

The majority opinion of the Supreme Court of Missouri acknowledged the stipulated fact that in a number of cities and counties the use tax rate is higher than the sales tax rate. The court ruled that any resulting discrimination against interstate commerce was constitutionally insignificant even though 26.5% of the state's population lives in counties where the use tax rate exceeds the sales tax rate, pointing out that only 6.86% of the intrastate sales were made in such counties (A-16-18). The court also emphasized that, because some counties had sales tax rates in excess of 5.725%, the overall amount of use tax collected state-wide is less than the aggregate sales tax collections (A-17).

The majority opinion placed heavy reliance on this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* said, in connection with a discussion of the Equal Protection Clause, that a taxing statute is not unconstitutional merely because it does not treat nonresidents and residents with "mathematical exactness." The Missouri court construed *General American* to permit the Missouri system of taxation "even though in some instances [it] may burden interstate commerce more heavily than intrastate commerce" (A-12). The majority attempted to distinguish later Commerce Clause cases on the ground that the taxes invalidated

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[3] Respondent Janette M. Lohman has succeeded Raymond T. Wagner as Director of Revenue. The other respondents intervened in the trial court in support of the constitutionality of the use tax. Respondents Delongs and the Associated General Contractors of Missouri argued that they would be at a "competitive disadvantage" if petitioners were successful in this action (First Amended Motion to Intervene, pp. 1,4).

there "imposed higher use taxes both on an individual basis and on an average statewide basis" (A-16). The court further held that even if those cases are not distinguishable, they are inconsistent with *General American* and that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state statutes to be constitutional" (A-19 n.9).

The court below acknowledged that "[a]n exacting application of the dicta contained in *Halliburton* [*Oil Well Cementing Co. v. Reily*, 373 U.S. 64] and certain cases following it would require invalidating §144.748" (A-16). But finding that the Commerce Clause "does not require identical treatment of all taxpayers," the majority upheld the taxing scheme because overall "it imposes a lesser tax burden on interstate commerce than it does on intrastate commerce and the local discrepancies do not rise to a level of quality or quantity that would demand a different result" (A-19).[4]

Chief Justice Robertson dissented (A-25). He rejected the majority's statistical analysis and argued that there is no *de minimis* exception to the Commerce Clause. He criticized on numerous grounds the majority's reliance on the equal protection discussion in the 1926 *General American* case and observed that the result reached there was at odds with numerous more recent Commerce Clause holdings. He concluded his dissent with these comments:

> "With respect, I do not believe the constitutionality of Missouri's tax scheme here is even fairly debatable. This state's tax is simply unconstitutional" (A-34).

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[4] The court also rejected petitioners' federal equal protection and due process claims and several state constitutional challenges.

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI USE TAX DISCRIMINATES AGAINST OUT-OF-STATE TRANSACTIONS AND THEREFORE VIOLATES THE COMMERCE CLAUSE.

The stipulated facts show that in more than half the state's taxing jurisdictions the use tax rate levied on interstate transactions is higher than the sales tax rate applicable to intrastate sales. This is because every interstate sale is subject to a 4.225% state-wide use tax plus a mandatory 1.5% additional use tax, whereas intrastate sales are subject to a 4.225% state-wide sales tax and may be, but are not necessarily, subject to a local sales tax.

The Commerce Clause of the United States Constitution prohibits state actions "which may fairly be deemed to have the effect of impeding the free flow of trade between the states." *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946). In the field of taxation, a tax on interstate activities may be sustained only when it has a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

A taxing statute discriminates against interstate commerce if it "provid[es] a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Simply and fundamentally stated, the "dormant" Commerce Clause requires equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. at 759.

Here, Missouri's taxing scheme clearly smacks of the kind of economic protectionism that the Commerce Clause proscribes.

In more than 50% of the state's subdivisions, a consumer who buys a washing machine at his local appliance store will pay a sales tax of less than 5.725%, whereas if he ordered the exact same model out of the J. C. Penney catalog, the use tax would be 5.725%. The local merchant thus obviously has a competitive advantage when seeking the consumer's business. Even if, as the Missouri Supreme Court said, only 26.5% of Missouri's population lives in areas where the use tax rate exceeds the sales tax rate, the resulting tax discrepancy can hardly be characterized as having an insubstantial effect on interstate commerce.[5] Indeed, the trial court found, based on the parties' stipulation, that the additional mandatory 1.5% use tax will generate more than $58 million in additional revenue in 1993, based on interstate sales of more than $3.8 billion (A-37).

The Missouri Supreme Court did not analyze the discriminatory aspect of individual transactions, nor did it bother to mention the extent of the effect of this discriminatory scheme either on out-of-state sellers of goods or on Missouri purchasers, such as petitioners, who must pay unduly high use taxes in more than half the taxing localities.[6] Instead, the court focused on the

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[5]The additional use tax is imposed on the purchaser, based on his place of residence, whereas the local sales tax is levied on the seller based on the rate applicable where his place of business is located. See *Fabick & Co. v. Schaffner*, 492 S.W. 2d 737 (Mo. 1973). Thus the fact that 26.5% of the population lives in areas with a local sales tax rate lower than 1.5% is more significant in this case than the fact that only 6.86% of *intra*state sales are made in those areas.

[6]The record showed, for example, that Petitioner Alumax is headquartered in St. Louis, where a use tax of 5.725% is applicable to equipment purchases from out-of-state. Alumax buys some products from a vendor in St. Francois County, Missouri, where the sales tax rate is only 4.975% (Stip. ¶5). Hence, foreign competitors of the St. Francois vendor are disadvantaged by the local use tax, and Alumax is encouraged to deal with the Missouri supplier and penalized if it decides to buy from that supplier's out-of-state competition.

fact that certain political subdivisions have adopted local sales taxes at a rate in excess of 1.5%, thus bringing the total sales tax in those areas to a rate higher than the 5.725% use tax rate. Because the localities adopting a greater than 1.5% local sales tax include some of the more populous areas of the state (such as Kansas City), the state can expect to receive approximately $100 million more in sales taxes than in use taxes in a given year, according to the court (A-17). This circumstance was deemed controlling by the majority:

> ". . . [I]t is apparent that the tax was designed, and apparently works, to avoid discrimination on a statewide basis." *Id.*

The Missouri Supreme Court's mathematical exercise misses the constitutional point. The issue is not whether there is a little or a lot of discrimination against interstate commerce. Nor is it determinative whether the effect on state revenue of the admitted discrimination against interstate commerce is offset in other parts of the state by higher tax rates on intrastate sales. Rather, the question is whether out-of-state sales are treated unequally and whether petitioners, as taxpayers, are being discouraged from buying interstate goods and taxed disproportionately when they do. "A State may not tax *a transaction or incident* more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (emphasis added).

This Court has been vigilant in its inspection of state use tax legislation because a use tax is a particularly effective vehicle for favoring local business over foreign competition. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court struck down a Louisiana use tax. Although the Louisiana scheme imposed sales and use taxes at the same rate, in some transactions certain components of out-of-state products were subject to the use tax, whereas those components were not taxed in intrastate sales. The taxing scheme also exempted articles

bought second-hand within Louisiana, while taxing under the use tax similar articles purchased in the same fashion in another state.

Even though the state court had described the discrepancy in the tax burden as "incidental," this Court looked at the way in which the statute operated and held it unconstitutional:

> "The conclusion is inescapable: Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Id.* at 70.

So the pivotal issue is not the overall effect of the taxing scheme on the state's treasury (*i.e.*, whether more sales taxes or use taxes are collected), but whether out-of-state purchases are treated equally with purchases from in-state merchants. In the present case, an Illinois mail-order house which sells a computer to a resident of Dexter or Kennett, Missouri, for example, will find itself at a competitive disadvantage because its transaction will be taxed at 5.725%, whereas the local Apple distributor will be able to charge a sales tax of less than 5.725%. Yet the Missouri Supreme Court says that this discrimination against interstate transactions is immaterial because the customer of a Kansas merchant buying his goods through the mail in Kansas City may be paying a use tax that is less than the comparable sales tax rate. That is of scant solace to the Illinois mail-order house and its Missouri customers, and no case supports the Missouri Supreme Court's conclusion that the local favoritism that hinders that merchant's ability to sell goods in Missouri is constitutionally insignificant or otherwise defensible.

This Court held in *Maryland v. Louisiana*, 451 U.S. 725 (1981), that the "common thread" running through the sales tax/use tax cases is "the equality of treatment between local and interstate commerce." *Id.* at 759. That case was an original proceeding decided by this Court on the pleadings. The taxing

state (once again, Louisiana) sought further hearings to establish that the extent of the discrimination was minimal. This Court rejected that argument and declared the statute unconstitutional as a matter of law, stating as follows:

> "It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the tax unconstitutional and eliminating the discrimination. We need not know how unequal the tax is before concluding that it unconstitutionally discriminates." *Id.* at 759-60.

This approach was recently reaffirmed in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"); *accord*, *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992) ("The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce").

The Missouri Supreme Court's attempt to trivialize the discriminatory effect of the state-wide additional use tax is also at odds with *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), where this Court rejected a "*de minimis*" argument based on a substantially smaller percentage of overall sales volume than is present here. In *Bacchus*, an excise tax on wholesale liquor sales exempted certain unique alcoholic beverages produced only by the taxing state. Even though the exempted sales counted for no more than .7739% of total liquor sales (*id.* at 268 n.9), the Court found prohibited discrimination against out-of-state producers. The Court said:

> "Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Conse-

quently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the state, there is a discriminatory effect." *Id.* at 271.

See also New Energy Co of Indiana v. Limbach, 486 U.S. 269, 276 (1988) ("Our cases indicate . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown").

The *Bacchus* Court also noted that the discriminatory exemption was enacted to protect local producers, thus intensifying the Commerce Clause concerns. So too here, the record showed — and the Director admitted — that the Missouri state-wide additional use tax of 1.5% was imposed to protect Missouri merchants who, prior to that time, were required to collect combined local and state sales taxes at a higher overall rate than the applicable state use tax. (See Respondents' Br., Mo. Sup. Ct. No. 75089, p. 22.)

The Missouri Supreme Court's opinion in this case is also in conflict with at least two decisions by other state supreme courts which have remained faithful to this Court's jurisprudence by striking offending use tax provisions very similar to those at issue here. *See American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978) (Ohio system, whereby some counties imposed sales and use taxes and other did not, impermissibly discriminated against interstate commerce); *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978) (where state imposed use tax of 4% and sales tax of 2%, with local option to add additional 2%, scheme violated Commerce Clause).

The Missouri General Assembly has flouted the Commerce Clause in an effort to aid Missouri business and has swelled the state's coffers at the expense of foreign vendors. The Missouri Supreme Court, desirous of enhancing state revenues, abdicated

its constitutional responsibility and failed to apply governing Commerce Clause principles as articulated by this Court. In order to discourage such behavior and to dampen the enthusiasm of other states for similarly offensive taxing schemes, this Court's intervention is needed.

II. *GENERAL AMERICAN* DOES NOT REQUIRE — OR EVEN PERMIT — THE RESULT REACHED BY THE MISSOURI SUPREME COURT; BUT IF IT DOES, IT SHOULD BE OVERRULED.

The Missouri Supreme Court paid little heed to *Halliburton* and the other use tax cases from this Court but instead relied almost completely on the 1926 decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* was not a sales/use tax case but rather involved an excise tax on the right to do business in the state. The tax was challenged as clearly designed to force nonresidents to become domesticated.

The majority of the Missouri Supreme Court hailed the approach taken in *General American* as "more flexible" and "more practical" (A-13). The problem with *General American*, however, is that the portion of that opinion which the Missouri Supreme Court found so alluring was contained in an analysis of the equal protection issue, rather than the Commerce Clause question. Indeed, *General American* was decided against the background of the "now rejected notion that only 'direct' burdens on interstate commerce were disapproved." *Armco, Inc.*, 467 U.S. at 643 n.7. *General American* has never been mentioned in any of this Court's subsequent Commerce Clause decisions and, in fact, has not been cited by this Court in any context in almost 50 years.

In *General American*, Louisiana had adopted a tax of "25 mills on the dollar 'of the assessed value of all rolling stock of nonresident . . . corporations, having no domicile in this state . . . .'" 270 U.S. at 370. The tax was imposed not on a transaction but

on a foreign corporation's property in Louisiana and was in lieu of the local tax assessed by the parishes. The nonresident corporation, though, could avoid the excise tax by "becoming domiciled in a parish" and paying the local tax. Because the corporation could opt out of the state tax without changing its actual business operations, the taxpayer in *General American* did not attack the Louisiana statute on the grounds that it burdened an interstate transaction more than a local transaction. Rather, the taxpayer argued that the statute was a "thinly disguised attempt to compel nonresidents doing interstate business in Louisiana to declare a domicile in this state." *Id.* at 372.

It was in this context that this Court considered whether the tax on the nonresident's property was "substantially" greater than the tax on residents. The Court upheld the Louisiana tax because the difference between the taxes on the property of resident and nonresident corporations was, on the record before the Court, *de minimis*. Absent a showing of discrimination "in some substantial way," the Court refused to infer that the Louisiana tax was really an attempt "to require the nonresident corporation to take out a license to do business within the state." *Id.* In other words, contrary to the interpretation placed on *General American* by the Missouri Supreme Court, that case did not hold that taxing an interstate transaction more than an intrastate transaction was permissible if the discrimination was small or localized. Rather, the *General American* Court merely refused to infer that a small or localized extra burden on the nonresident corporation was necessarily an unconstitutional attempt to force that corporation to become domiciled in the state.

Even though *General American* is therefore off the mark and is primarily an equal protection, not a Commerce Clause, case, it has become — as it was in this case — a rallying point for state courts desirous of sustaining local taxing measures which assist and protect in-state merchants. *See, e.g., Department of Revenue v. Warren Petroleum Corp.*, 119 N.E.2d 215 (Ill. 1954); *Lane*

Construction Corp. v. Comptroller of the Treasury, 178 A.2d 904 (Md. 1962); *Don McCullagh, Inc. v. State*, 93 N.W.2d 52 (Mich. 1958); *National Can Corporation v. State of Washington*, 715 P.2d 128 (Wash. 1986), *vacated sub nom. Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987).

The Missouri Supreme Court ruled that discrimination against out-of-state transactions due to lower sales tax rates in some counties can be justified by *higher* sales tax rates in other parts of the state. As noted, that holding draws no support from *General American*; more importantly, it is contrary to the ruling and the rationale of *Armco, Inc.*, 467 U.S. 638. *Armco* involved a gross receipts tax levied on persons selling at wholesale in the state, but it exempted local manufacturers. The state tried to defend the taxing scheme by pointing out that manufacturers were assessed a tax on their output at a *higher* rate than the gross receipts tax. The Court rejected the argument that the two taxes were "compensating" or "complementary" and struck down the gross receipts tax. Likewise here, Missouri cannot defend its discriminatory treatment of out-of-state vendors in 53% of the state by pointing to transactions involving other vendors in other parts of Missouri. Taxing programs that are truly "complementary" will pass Commerce Clause scrutiny only when the burden on a foreign merchant is equal to that of his local counterpart. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937); *Maryland v. Louisiana*, 451 U.S. at 759.[7]

The court below readily acknowledged that "the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations" (A-16) and conceded that "an

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[7] A taxing system could scarcely be described and defended as "complementary" or "compensating" if, for example, it imposed a use tax of 10% on all sales into Missouri by Kansas merchants but offset the burden of that levy by making all sales from Illinois tax-free. Yet such a scheme would be operationally akin to the current Missouri arrangement.

exacting application of the dicta contained in *Halliburton* and certain cases following it would require invalidating §144.748" (*Id.*). But the court refused to follow that course, suggesting that *Halliburton* and its progeny were "to some extent" distinguishable (A-16). It then went on to hold that even if *Halliburton, et al.*, are not distinguishable "they are nonetheless inconsistent with *General American*," and finding itself torn between two supposedly conflicting lines of authority, the court said that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state's statutes to be constitutional" (A-19 n.9). The court used the "flexibility" it found in *General American* to tip the constitutional scales because: "Every indulgence must be made in favor of the legislature's handiwork" (*Id.*).

The fallacy of the majority's reasoning was cogently capsulized in Chief Justice Robertson's dissent, where he demonstrated that *General American* is inapposite for at least four different reasons (A-26-30) and that the relevant Commerce Clause cases require invalidation of the Missouri tax (A-30-34). Nevertheless, the majority opinion catapults *General American* into prominence as a Commerce Clause precedent, a role for which it was not designed and which it ill serves. This Court should grant certiorari to halt the increasing propensity of state courts to use this 67-year old equal protection decision to override prevailing Commerce Clause jurisprudence.

CONCLUSION

For the reasons stated, petitioners request the Court to grant a Writ of Certiorari to review the judgment of the Supreme Court of Missouri.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 75089

[Filed: June 29, 1993]

ASSOCIATED INDUSTRIES OF MISSOURI,
and ALUMAX FOILS, INC.,
Appellants,

vs.

DIRECTOR OF REVENUE and
DELONG'S INCORPORATED, et al.,
Respondents.

APPEAL FROM THE
CIRCUIT COURT OF COLE COUNTY
Honorable James F. McHenry

Appellants challenge the constitutionality of § 144.748, RSMo. Supp. 1991.[1] The statute imposes a flat 1.5 percent use tax for the privilege of storing, using or consuming tangible personal property in Missouri that was purchased outside the state. Appellants seek a declaration that the tax violates the commerce, due process, and equal protection clauses of the United States Constitution and the due process, equal protection and uniformity clauses of the Missouri Constitution and an injunction permanently enjoining enforcement of the statute. The trial court denied both declaratory and injunctive relief. We have exclusive appellate jurisdiction under article V, § 3 of the Missouri Constitution and affirm the decision of the trial court.

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[1] With the exception of this provision, all statutory references are to RSMo 1986, unless otherwise indicated.

I.

Appellant Associated Industries of Missouri ("AIM") is a not-for-profit corporation comprised of persons, firms, partnerships and corporations engaged in business or industry in Missouri. AIM's members pay Missouri sales and use taxes on purchases of tangible personal property purchased inside and outside of the state.

Appellant Alumax Foils, Inc., (Alumax") is a Delaware corporation headquartered in St. Louis, Missouri. It is a member of AIM. Alumax manufactures and sells foil products inside and outside of Missouri. Some of its purchases in Missouri are subject to local sales taxes at rates less that [sic] 1.5 percent.

Respondent Raymond T. Wagoner, Jr., was the duly appointed and qualified director of revenue, who in such capacity was charged with administering § 144.748.

Respondent intervenors include: Delong's, Inc., a steel fabricating company located in Jefferson City; the City of Blue Springs, a municipality located in Jackson County; Gary Markenson, a taxpayer residing in Jefferson City; the Missouri Association of Counties, a not-for-profit corporation representing the interests of 112 Missouri counties; the Missouri Municipal League, a benevolent corporation representing the interests of 540 municipalities; and, the Associated General Contractors of Missouri, a benevolent corporation whose members include contractors and other with similar business interests. They all allege that they will suffer harm should appellants prevail.

Respondent intervenors argue that appellants lack standing to challenge the constitutionality of § 144.748. The parties, however, have stipulated that appellants are subject to payment of the use tax under § 144.748 and that the Appellants pay sales taxes in geographical areas where the aggregate sales tax is less than the aggregate use tax. Accordingly, § 144.748 affects appellants' business interests as they choose between in-state and out-of-state purchase of goods, sometimes with differing sales and use tax burdens. This is sufficient to confer standing on appellants, Alumax and AIM.[2]

II

Before considering the constitutionality of § 144.748, it is necessary to set forth the comprehensive sales and use tax scheme in Missouri. Generally, a sales tax is imposed upon the sale of an item of tangible personal property within the state. A use tax is a one-time tax attached to the use, consumption or storage of an item of tangible personal property, otherwise exempt from sales tax because it was purchased from a seller outside of the state. Use taxes are often referred to as "complementary" to sales taxes. In addition to raising revenue, use taxes attempt to equalize the competitive position of intrastate and interstate commerce by assuring that Missouri residents who purchase from either source bear equivalent tax burdens.

Section 144.020 imposes a statewide sales tax of 4.225 percent on the sales price of tangible personal property sold in Missouri. Section 144.610 imposes a statewide use tax of 4.225 percent on the sales price of tangible personal property sold outside of Missouri but stored, used, or consumed in Missouri.

Other provisions authorize, but do not require, county and municipal governments to impose various local sales taxes on the sale of tangible personal property sold within their jurisdiction. *See, e.g.*, §§ 66.600 to 66.635, 67.500 to 67.545, 92.440 to 92.420, 94.500 to 94.519, 94.600 to 94.655, and 94.700 to 94.745. Prior to the enactment of § 144.748, these permissive sales tax statutes resulted in an aggregate sales tax rate higher

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[2] In *Mo. Outdoor Adv. v. Hwys. & Transp. Comn.*, 826 S.W.2d 342 (Mo banc 1992), we held that associations have standings to present the common interests of their members.

than 4.225 percent in the vast majority of counties and municipalities in the state, while the use tax on similar transactions made outside the state remained at 4.225 percent.

In response, the General Assembly enacted § 144.748, also known as the "additional use tax". The statute imposes an additional flat use tax at the rate of 1.5 percent on the sales price of tangible personal property purchased outside the state. While the tax is imposed and collected by the state, it is distributed back to the counties in accordance with a formula provided in the statute.

As a result of the flat use tax rate, the aggregate use tax imposed upon all interstate transactions is now 5.725 percent of the sales price. The aggregate sales tax rate on an identical intrastate transaction, however, may be higher or lower than 5.725 percent, depending upon the rate that each county and municipal government has imposed under the permissive sales tax provisions.

Generally, most taxable sales are subject to a higher aggregate sales tax rate than the aggregate use tax rate. The following cities, however, are among those areas where the aggregate sales tax rate falls below 5.725 percent: Dexter in Stoddard County, Clifton Hill in Randolph County; New Cambria in Macon County, Napolean in Lafayette County; Bixby and Glover, both in Iron County; Brandsville in Howell County; Stanberry in Gentry County; Kennett and Malden, both in Dunklin County; Winston in Daviess County; Gordonville in Cape Girardeau County; Monett in Barry County; and Farber in Audrain County. Consequently, consumers such as appellants who purchase, for example, a copy machine in Dexter, Missouri, pay less in sales taxes than they would have paid in use taxes had they purchased the copy machine outside the state. It is this disparity that appellants contest.

In the case at bar, the parties have stipulated to figures that reflect taxable sales made in Missouri in the calendar year of 1990. Respondents argue that based on these figures, had § 144.748 been enacted at that time, the use tax would have been less burdensome on interstate commerce than the complementary sales tax on intrastate sales when considered on a statewide basis. The record reveals that in 1990, the use tax would have imposed approximately $100,000,000 less in overall tax liability than would have been generated had the sales been made instate and subject to sales taxes. Based upon these stipulated facts, 93.14 percent of all taxable sales made in Missouri were subject to an aggregate sales tax rate of 5.725 percent or higher. Of those sales, 55.32 percent were subject to an aggregate sales tax rate in excess of 5.725 percent, with some aggregate sales tax rates as high as 7.5 percent. However, 6.86 percent of the taxable intrastate sales were subject to a sales tax rate less than 5.725 percent, which would have been the statewide aggregate use tax rate had § 144.748 been enacted.[3]

Thus, the core issue before the Court is whether a state use tax may impose a greater burden than the various sales taxes in specific localities, if on a statewide basis the use tax imposes a lesser overall burden than do all the various sales taxes. We hold that it may where, as here, the state displayed no purpose to

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[3]It is also possible to examine other comparisons. The number of counties and municipalities in which the aggregate use tax rate exceeds the aggregate sales tax rate is 841 out of 1,573, or approximately 53.5 percent. Also, 26.5 percent of Missouri's population live in counties where the use tax rate exceeds the sales tax rate. Neither of these percentages make adjustment for the fact that certain counties that have sales tax rates lower than the use tax rates contain municipalities with sales tax rates that are higher than the use tax rates. Hence, these percentages are most likely overstated for use here. At any rate, however, such comparisons do not reflect commercial activity and the impact upon that activity of sales or use tax burdens. Accordingly, the most helpful focus in an examination of whether discrimination exists against commerce is the burden on actual sales.

discriminate against interstate commerce and has substantially avoided doing so.[4]

III

Article I, § 8, cl. 3, of the United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." Although the clause is an express grant of power, it also has been understood to imply a "negative sweep" that limits the states' power to interfere with interstate commerce. *Quill Corp. v. North Dakota*, __ U.S. __, 119 L.Ed.2d 91, 104 (1992). This 'negative' aspect of the commerce clause has long been held to prohibit states from discriminating against interstate commerce but does not necessarily require "identical treatment of all taxpayers engaged in such commerce." *Tatarowicz and Mims-Velarde, An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 925 (1986).

The United States Supreme Court has oscillated in its interpretation on the commerce clause over the years, particularly as that clause concerns limitations on state taxation powers. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 420 (1946); *see Quill*, __ U.S. __, 119 L.Ed.2d at 104. In the earliest decisions, the Supreme Court declared that "no State has the right to lay a tax on interstate commerce in any form." *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888); *see also Brown v. Maryland*, 12 Wheat 419, 6 L.Ed. 678 (1827). Later cases interpreted the commerce clause less stringently by distinguishing between direct and indirect burdens on interstate commerce. Direct burdens were prohibited while indirect burdens were generally permitted. *Quill*, __ U.S. __. 119 L.Ed.2d at 104 *citing Sanford v. Poe*, 69

[4] Our decision is limited to the facts in this record. Sales tax rates may change or purchasing patterns may vary. Whether the statute's application to future situations remains within constitutional bounds must be determined in accordance with facts as they occur.

F. 546 (6th Cir. 1895), *aff'd sub nom Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897). The wavering doctrinal lines of the Court's decisions reflect the tension between two competing concepts: the view that interstate commerce enjoys a "free trade" immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way. *Goldberg v. Sweet*, 488 U.S. 252 (1989).[5]

The currently accepted commerce clause approach is articulated in *Complete Auto Transit, Inc. v. Brady*. There, the Court attempted to reconcile the concept of unrestricted access to the national market with each state's authority to collect its fair share of revenues from interstate commercial activity. 430 U.S. 274, 285 (1977). *Complete Auto* emphasizes looking past "the formal language of the tax statute [to] its practical effect." *Id.* at 279. Under the *Complete Auto* analysis, a state tax on interstate commerce will be sustained against a commerce clause challenge so long as the tax "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279. Our review of § 144.748 focuses on the third prong of the *Complete Auto* test: Does the statute discriminate against interstate commerce?

The issue of whether complementary use and sales tax schemes are discriminatory under the commerce clause has been the

[5] The murky nature of the precedents on this issue was noted by this commonly cited satirical restatement of the law of interstate commerce:

> Although the power of the Federal Government over interstate commerce is plenary, the states may regulate commerce some, but not too much. If a state attempts to regulate commerce too much such regulation will be unconstitutional. Caveat: This Restatement is not intended to express any opinion as to how much regulation is too much.

W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 349 (4th ed. 1975).

subject of a substantial amount of litigation. When states first began to adopt sales taxes, they feared that local merchants would lose business when prospective buyers purchased outside the state to avoid local sales tax liability. States also feared the loss of revenue they would incur as a result of the diversion to nontax sellers from other states. *Hellerstein, Complementary Taxes as a Defense to Unconstitutional Tax Discrimination,* 39 Tax Law. 405, 407 (1986). Complementary use taxes developed in response to concerns about the troublesome gap created by the adoption of sales taxes.

When considered in isolation, use taxes are discriminatory, as they are intended apply only to goods acquired out of state. *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 69 (1963). Because they are usually paired with corresponding sales taxes, however, the Supreme Court has upheld such tax schemes. The Court has found that in the context of the overall tax structure such statutes may properly impose on the out-of-state purchase of goods an equivalent burden to that imposed on an in-state purchase. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937).

At issue in *Henneford* was a Washington use tax imposed upon the "privilege of using within [the taxing] state any article of tangible personal property" that was not otherwise subject to a tax equal to or greater than the use tax. 300 U.S. at 581. The Court stated:

> Equality is the theme that runs through all the sections of the statute... When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into [the state]. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation, the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

Id. at 584. The critical question, the Court explained, was not whether a distinction existed "in form", but whether "there was any substantial discrimination in fact." *Id.* at 585, *quoting Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1932).

The tax scheme in the instant case is slightly different from the typical complementary sales/use tax scheme sanctioned in *Henneford.* Here, we have a use tax that treats interstate commerce more favorably than intrastate commerce on an overall basis. Because local sales taxes are permissive in Missouri, however, the comparison between the use and sales tax varies from locality to locality. As previously stated, had § 144.748 been enacted in 1990, this would have resulted in 55.32% of instate sales being subject to a higher sales tax rate, 36.82% of instate sales being subject to an equal sales tax rate, but 6.86% of instate sales being subject to a lower sales tax rate than the use tax rate.

IV

The standard to be applied for determining whether discrimination exists, the third prong of the *Complete Auto* test, has not been stated with consistency. It is difficult from reading the various decisions to determine whether their outcomes are the result of differing factual contexts or shifting ideology. Generally, *Halliburton,* 373 U.S. 64, 70-71 is the primary case implying a rather rigid dollar-for-dollar equivalence between intrastate and interstate taxation. *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1932), and *General American Tank Car Corp. v. Day,* 270 U.S. 367 (1925), however, are the leading cases appearing to allow for a more practical approach that does not require "math-

ematical exactness." A brief review of these and other representative cases is in order.

A.

In *Halliburton,* the Court considered a Louisiana use tax imposed on specialized equipment purchases and assembled outside the state. Although the sales and use tax rates were identical, they were applied to different tax bases: labor and ship overhead costs were excluded from the sales tax base but were included in the use tax base. The Court found that including these costs in the use tax base had the discriminatory effect of imposing a greater tax on goods manufactured outside of Louisiana than on goods manufactured within the state. The Court declared the tax unconstitutional and stated:

> [E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. In this case, the "incidental discrepancy" — the labor and shop overhead for the units in dispute — amounts to $1,547109.70. The use tax rate in Louisiana is 2% and has risen in some States to 4%. The resulting tax inequality is clearly substantial.

Halliburton, 373 U.S. at 70-1.[6]

Some state courts have used *Halliburton* to strike their own use tax provisions. The Supreme Court of Oklahoma relied on

[6] *See also Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984) (New York tax credit for products shipped from New York held unconstitutionally discriminatory against interstate commerce); *Maryland v. Louisiana,* 451 U.S. 725 (1981) (Louisiana "first use tax" imposed on imported natural gas to "compensate" for Louisiana severance tax held unconstitutional because the tax was not based on complementary events and because certain exemptions and credits favored local interests); *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977) (New York stock-transfer tax held unconstitutional because it discriminated against interstate commerce by reducing taxes on in-state transfers but not out-of-state transfers.)

Halliburton when it struck down a use tax similar to the use tax at issue here. The use tax rate in *Phillips v. Oklahoma Tax Comm'n,* 577 P.2d 1278 (Ok. 1978), was increased from 2 percent to 4 percent of the sales price of tangible personal property used or consumed in Oklahoma. The statewide sales tax remained at 2 percent.

The state argued that the inequality was rectified by the existence of optional and non-uniform municipal sales taxes. The Oklahoma Court rejected this argument outright, citing *Halliburton* as requiring that *"equality* for the purposes of competition and the flow of commerce *is measured in dollars and cents and not legal abstractions."* *Id.* at 1284. It then found that the $12,000,000 that would be raised by the increased use tax was "clearly substantial" and thereby discriminatory. *Id.* at 1284.

The Supreme Court of Ohio also relied on *Halliburton* to strike an Ohio use tax statute. In *American Modulars Corp. v. Lindley,* 376 N.E.2d 575, 576 (1978), individual counties were authorized, but not required, tc levy an additional one-half percent sales and use tax on property purchased or used within their boundaries.[7] The ultimate result of the Ohio tax scheme was that all property used or purchased in any particular county would be taxed at an equivalent rate. However, a purchaser could choose to buy an item in another county without the permissive tax, thereby obtaining an intrastate tax advantage when compared to an outstate purchase delivered to the taxpayer's home county.

The Ohio Court found that this result provided a direct commercial advantage to local businesses that would impede the free flow of trade between the states. *Id.* at 577, *citing Freeman*

[7] In addition to the permissive county sales and use taxes, the state imposed a four percent tax on the sale or use of tangible personal property purchased or consumed in Ohio.

v. Hewitt, 329 U.S. 249 (1946). It concluded that the statute discriminated "against out-of-state acquisitions as invidiously as it would if it subjected those purchases to an unfavorable tax basis." *Id., citing Halliburton*, 373 U.S. at 70.

The California Supreme Court also cited *Halliburton* in *Woosley v. State*, 838 P.2d 758 (Ca. 1992), when it struck down a use tax. The use tax in *Woosley* imposed a higher tax on vehicles originally sold outside California than the tax charged on similar vehicles first sold within the state. Although the tax rate was the same for both, the tax bases differed. The tax base for vehicles originally purchased outside the state was determined by the actual purchase price. The tax base for vehicles purchased within California was determined by the manufacturer's suggested base price.

The Court found that the practice resulted in the imposition of significantly higher license fees for vehicles purchased outside the state than for those first sold in California. The discrepancy was caused, in part, by the inclusion of factory-installed accessories and optional equipment in the actual purchase price, which were excluded from the suggested base price for vehicles originally purchased in California. *Id.* at 762-3.

The only justification offered by the state for the discrimination was administrative convenience. The court found that even if such concern could, under some circumstances, justify an obstruction to interstate commerce, the showing made by the state was insufficient because the state had previously utilized nondiscriminatory alternatives. *Id.* at 771.

B.

Another line of authority, however, permits complementary state taxes on interstate commerce "in lieu of" local taxes even though in some instances they may burden interstate commerce more heavily than intrastate commerce. *General American*, 270

U.S. 367 (1925); *Gregg Dyeing Co.*, 286 U.S. 472 (1932); *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1958); *Illinois Cent. R.R. v. Minnesota*, 309 U.S. 157 (1940); *Department of Revenue v. Warren Petroleum Corp.*, 119 N.E.2d 215 (Ill. 1954). These cases give the commerce clause a more flexible interpretation that allows for a more practical standard.

General American is the seminal case of the "in lieu of" doctrine. There, the Supreme Court sustained a tax on the rolling stock of out-of-state firms even though the parties stipulated that there was a disparity between the rate the out-of-state firms were charged and the rate an instate firm would have had to pay. *Id.* at 374. The out-of-state firms were subject to a flat rate of 25 mills per dollar of assessed value statewide, while instate firms were subject to higher or lower rates in various parishes. *Id.*

Despite the fact that local taxes in some parishes were below the flat tax rate imposed on interstate commerce, the Court sustained the tax because the Appellants failed to show that the flat rate of 25 mills fell below the general average of taxes on residents collectively statewide. *Id.* The Court stated:

> "[W]here the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purpose and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary." *Id.* at 373.

Specifically, appellants had argued that the average local tax statewide was at the rate of twenty-one mills, four mills less than

the interstate tax at issue. Although noting that this had not been proven, the Court went on to state that it would not hold that:

> A four mills variation in one year not shown to be a necessary or continuing result of the scheme of taxation adopted, would be an unconstitutional discrimination; for in such a scheme of complementary tax statutes, however fairly devised, it would be impossible to provide in advance against occasional inequalities as great as that here complained of. *Id.*

In *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), the Court followed the same theme expressed in *General American Tank*, stating:

> We regard the substance rather than the form, and the controlling test is formed in the operation and effect of the statute as applied and enforced by the state. *Id.* at 476.

The Court further noted that:

> Discrimination like interstate commerce itself is a practical conception. We must deal in this matter, as in others, with substantial distinction, and real injury. *Id.* at 481.

The more practical approach indicated in *General American* and *Gregg Dyeing Co.* also has been relied upon by state courts in upholding use taxes where the overall tax scheme was deemed fair but worked some inequalities in certain circumstances. For example, in *Lane Construction Corp. v. Comptroller of the Treasury*, 178 A.2d 904 (Md. 1962), the Court of Appeals of Maryland sustained a use tax that used a different tax base than the base used in determining the sales tax. Originally both sales and use taxes were based on the actual purchase price. Thus, goods purchased outside the state were taxed on their purchase price no matter how long after the purchase they were first used, stored or consumed in Maryland. *Id.* at 905.

In order to soften the impact of the use tax in situations where goods first became taxable in Maryland after long use elsewhere, the legislature provided that in computing the assessable basis, 10 percent of the purchase price be deducted for each full year of use outside the state. *Id.* at 905. Appellant argued that the formula imposed higher taxes on out-of-state goods.

The Court found:

> The fact that, in a given circumstance, the tax produced by the statutory formula of the value of an item imported, and the amount at which a comparable item could then be bought secondhand in Maryland — if one were available — [did] not coincide precisely, [did] not of itself make the tax unconstitutional."

The Court upheld the tax and explained:

> The Supreme Court in viewing the practical operation of use taxes attacked as in violation of the commerce clause, has looked to see if substantial discrimination against "foreigners" in plan or effect was present. [citations omitted]. The Court has not required that mathematical equality be given to out-of-state taxpayers or products, as long as such equality was reasonably attempted and somewhat closely achieved.

Id. at 907, *citing Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182; *Southern Pac. Co. v. Galagher*, 306 U.S. 167, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Gregg Dyeing Co. v. Query*, 286 U.S. 472; *General American Tank Car Corp. v. Day*, 270 U.S. 367; Hartman, State Taxation of Interstate Commerce, p. 163.

The Supreme Court of Michigan also adopted this reasoning in rejecting a commerce clause challenge based upon sales and use tax disparities between vehicle sales made for leasing intrastate and vehicle sales made for leasing interstate. *Don McCullagh,*

Inc. v. State, 93 N.W.2d 252, 257 (Mich. 1958) (appeal dismissed for lack of substantial federal question). The Court stated:

> [T]he Michigan legislature has acted accordingly to work out a fair and just system. Mechanically a perfect result may not be obtained in all instances. In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan. It is conceivable, however, that under the same sort of transaction as is here involved such condition might well be reversed. It is questionable if any tax law could be devised that would result in absolute equality under all circumstances.

Id. The Court then concluded that despite a few disparities, the tax was constitutional.

V

In deciding the present case, we acknowledge that the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations. Approximately 6.86% of instate sales in 1990 were made in localities where the interstate use tax rate would have been higher than the intrastate sales tax rate had § 144.748 been in effect. An exacting application of the dicta contained in *Halliburton* and certain cases following it would require invalidating § 144.748. We do not, however, believe that this is the appropriate course to follow for a number of reasons.

Halliburton, Maryland v. Louisiana, Westinghouse and *Boston Stock Exchange*, to some extent, can be distinguished. In each of these cases the taxes that were found unconstitutional imposed higher use taxes both on an individual basis and on an average statewide basis. In no case was the use tax ever less than the sales tax. Whether the discrimination against interstate

commerce was small or large in dollar amount, it was mandated in every transaction and unmitigated by the structure of the tax.[8]

In the present situation, this is not so. The use tax enacted by § 144.748 was calculated to produce a statewide result of a lesser burden on interstate commerce than exists for intrastate commerce. The stipulated facts indicate that for 1990, the use tax at issue would have resulted in approximately $100,000,000 less in overall tax liability than the corresponding sales taxes. When combined with the fact that 93.14% of the 1990 sales would have resulted in use taxes either at the same or at lower rates than the complementary sales tax, it is apparent that the tax was designed, and apparently works, to avoid discrimination on a statewide basis.

Moreover, the formalistic and exacting approach found in the dicta of the above cases seems to have been abandoned in the two most recent Supreme Court commerce clause decisions: *Trinova Corp. v. Michigan Treas. Dept.*, 498 U.S. __, 112 L.Ed.2d 884 (1991), and *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1912 (1992). Citing *Mobil Oil Corp. v. Comm. of Taxes of Vt.*, 445 U.S. 425 (1980), which had recognized the "conflicting precedents' of the past, *Trinova* stated that:

> We seek to avoid formalism and to rely upon a "consistent rational method of inquiry [focusing on] the practical effect of a challenged tax."

Id. at 904. In *Quill*, it was noted that "*Complete Auto* emphasized the importance of looking past 'the formal language of the tax statute [to] its practical effect.'" *Id.* at 1912. Interestingly, Judge Benton has just commented on the new emphasis of "practical

[8] The *Woosley* case also can be distinguished in this manner. *American Modulars* is suspect in its reliance on *Freeman*, which was overruled by *Complete Auto*. In *Phillips*, there was apparently no actual showing by the state that the tax was not discriminatory, although the state argued that in theory.

analysis" of "economic realities" in tax cases litigated under the commerce clause in his concurring opinion in *Bi Go Markets, Inc.* and *Wetterau, Inc. v. Morton*, 843 S.W.2d 916, 921 (Mo. banc 1992).

Under a "practical analysis" or "practical effect" test, § 144.748 passes scrutiny. In a state where a permissive system of local sales tax is allowed, the adoption of a statewide complementary use tax that results in a dollar for dollar match is most likely impossible. The Missouri legislature appears to have prudently set the use tax rate established by 144.748 at a level that taxes most transactions at a lower rate than the sales tax rate. On a statewide basis "interstate commerce", as such, is not discriminated against. While in certain localities the use tax may exceed the sales tax, and while individual purchasers may chose [sic] to take advantage of these discrepancies on occasion, we must recall that while the commerce clause protects "interstate commerce", it does not require identical treatment of all taxpayers. In short, we do not find that appellants have established a discrimination that produces the type of "real injury" required by *Gregg Dyeing Co.* to invalidate a tax.

Appellants have suggested that the tax more properly could have been excepted from sales occurring in localities with rates of sales taxes below 1.5%. The state might also have required that the use tax mirror the permissive local sales tax. Neither option, however, would guarantee a better result. *American Modulars* illustrates that even these types of statutes are subject to criticism, as residents of one county may travel to another for tax advantage purchases. Depending upon the actual tax rate s, demographics, and purchasing patterns, they might even result in greater discrepancies.

The legislature chose, instead, to enact a uniform but relatively low use tax rate that on a statewide basis compensates for any local discrepancy. So long as mathematical exactness is not

required, this is a legislative and not a judicial area of discretion into which we should neither speculate nor venture. As stated in *Trinova:*

> [w]e have always declined to undertake the essentially legislative task of establishing a single constitutionally mandated method of taxation.

Id. at 913, citing *Goldberg v. Sweet*, 488 U.S. 252 (1989).

We find that the tax scheme in the present case does not discriminate against interstate commerce in purpose or practical effect. It imposes a lesser tax burden on interstate commerce than it does on intrastate commerce and the local discrepancies do not rise to a level of quality or quantity that would demand a different result. *General American*[9] and the Supreme Court cases following it allow the states practical latitude in designing systems of complementary taxes. Section 144.748 is within these bounds.

VI

Appellants also maintain that § 144.748 violates the due process and equal protection clauses of the United States Constitution and the due process, equality and uniformity clauses of the Missouri Constitution. The due process claims of the federal and state constitutions both require a minimum connection between the state and the person, property or transaction it seeks to tax, and that the income attributed to the state for tax purposes be

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[9]To the extent *Halliburton, Maryland v. Louisiana, Westinghouse* and *Boston Stock Exchange* are not distinguishable, they are nonetheless inconsistent with *General American*. In the face of inconsistent precedent from the United States Supreme Court, we will presume our state statutes to be constitutional. Accordingly, § 144.748 will be "constitutional until the contrary is shown. Every indulgence must be made in favor of the legislature's handiwork." *Associated Industries v. State Tax Commission*, 722 S.W.2d 916, 918 (Mo. banc 1987).

rationally related to the values of the taxing case. *Quill*, __ U.S. __, 119 L.Ed.2d at 102; *Air Evac EMS, Inc. v. Director of Revenue*, 779 S.W.2d 573 (Mo. 1989). The first and fourth prongs of the *Complete Auto* test satisfy this requirement, as they demand more than the due process requirement of "minimum contacts" for commerce clause purposes. *Trinova*, __ U.S. __, 112 L.Ed.2d at 904; *Quill*, __ U.S. __, 119 L.Ed.2d at 107 and n.7. We find no basis in the record before us to support a challenge to § 144.748 on this basis.

Appellants' attack on § 144.748 under the equal protection clause of the federal constitution and the uniformity clause of the Missouri Constitution also fails. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. IV, § 1. Missouri's uniformity clause embodies a similar concept. It provides, in relevant part, "[t]axes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the the [sic] tax." Mo. Const. art. X, § 3.

The validity of a state tax statute under the equal protection clause is determined under the rational basis standard. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983). Under this test, a statute will be sustained if the state legislature reasonably could have concluded that the challenged classification would promote a legitimate state purpose. *Id.* Missouri's uniformity clause uses a similar standard of reasonableness as described in *State v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949), where the Court stated:

> There is no precise yardstick as to reasonableness of classification and the rule of equality of necessity often tends to practical inequalities. Taxation is not an exact science and tax acts are not to be condemned merely because unavoidable inequalities may result. But the classification cannot be "palpably arbitrary."

In the present case, we find the state's choice of a uniform use tax rate is rationally related to its legitimate goals of avoiding discrimination against interstate commerce and trimming administrative costs;[10] and the classification of interstate and intrastate commerce — the former being taxed on the purchase of a product and the latter being taxed on the use of a product in the state — is neither arbitrary or capricious and satisfies the equal protection clause and Missouri's uniformity clause. *Southwestern Bell Telephone v. Morris*, 345 S.W.2d 62 (Mo. banc 1961).

We also reject appellants' contentions that the enactment and implementation § 144.748 violate Mo. Const. art. X, §§ 1 and 10(a). Article X, § 1, authorizes the General Assembly to exercise taxing power for "state purposes." It also authorizes county and other political subdivisions to exercise taxing power under the power granted to them by the General Assembly for "county, municipal and other corporate purposes." Article X, § 10(a), specifically prohibits the General Assembly from imposing "taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes."

Appellants allege that § 144.748 violates these provisions because it is a state tax imposed for local purposes. While we agree that § 144.748 is a state tax, we do not agree that it was imposed for local purposes. Although local county and municipal taxes caused the initial imbalance between the sales and use taxes, § 144.748 was enacted for the "state purpose" of equalizing the burden between interstate commerce and intrastate commerce. The state has a legitimate interest in preventing the loss of business that Missouri merchants would suffer as pro-

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[10] Although administrative convenience is rarely, if ever a legitimate state purpose under the commerce clause, it does suffice for equal protection purposes. *General American*, 270 U.S. at 372.

spective buyers purchased outside the state to avoid the additional local sales taxes and a legitimate interest in preventing the loss of revenue as a result of the diversion. *Trinova*, 493 U.S. __, 112 L.Ed.2d at 912 (1991).

By finding § 144.748 is a tax imposed by the state for a "state purpose," appellants' argument that the statute violates art. X, § 22 becomes moot. This provision, one part of what is commonly referred to as the Hancock Amendment, requires voter approval before any tax may be levied by a county or other political subdivision. It states, in relevant part:

> (a). Counties and other political subdivision are hereby prohibited from levying any tax, license or fees, not authorized by law, charter for self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charger when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

Because § 144.748 was enacted by the state for state purposes, Mo. Const. art. X, § 22, is wholly inapplicable.

Appellants make a similar argument that § 144.748 violates Mo. Const. art X, § 16, which requires voter approval of a state tax when it causes the revenue limits specified in art. X, § 18, to be exceeded. Section 18 provides, in relevant part:

> (a). There is hereby established a limit on the total amount of taxes which may be imposed by the general assembly in any fiscal year on the taxpayers of this state. Effective with the fiscal year 1981-1982, and for each fiscal year thereafter, the general assembly shall not impose taxes of any kind, which together with all other revenues of the state, federal funds excluded, exceed the revenue limit established in this section. The revenue limit shall be calculated for each fiscal year and shall be equal to the product of the ratio of total state revenues in fiscal year 1980-1981 divided by the personal income of Missouri in calender [sic] 1979 multiplied by the personal income of Missouri in either the calander [sic] year prior to the year in which appropriations for the fiscal year for which the calculation is being made, or the average of personal income of Missouri in the three previous calender [sic] years, whichever is greater.

We find the record totally void of any evidence supporting appellants' contention and thereby reject this argument.

Finally, appellants allege that § 144.748 violates Mo. Const. art. IV, § 28, which governs treasury withdrawals of state funds. Section 28 provides, in relevant part:

> No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the proper purpose as directed by the general assembly of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it.

Appellants contend that § 144.748 violates this section of the constitution because the statute remits a certain portion of the collected tax to each locality without an appropriation by law.

We do not find Mo. Const. art IV, § 28, applicable to the present case. It applies only to *state* funds deposited in the state treasury. Instead, we find that Mo. Const. art IV, § 15, is the applicable provision. It provides:

> The state treasurer shall be custodian of all state funds and funds received from the United States government. The department of revenue shall take custody of and invest

> nonstate funds as defined herein, and other moneys authorized to be held by the department of revenue... All revenue collected and moneys received by the department of revenue which are nonstate funds as defined herein shall be promptly credited to the fund provided by law for that type of money. . . As used in this section, the term 'nonstate funds' shall include all taxes and fees imposed by political subdivisions and collected by the department of revenue; *all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions;* and all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue.

The revenue collected by § 144.748 constitutes "nonstate funds." It is a tax imposed by the state, collected by the department of revenue, and distributed by the department of revenue to political subdivisions. Thus, there is no violation of Mo. Const. art. IV, § 28.

VII

Accordingly, we hold that the uniform tax rate imposed by § 144.748 is not unconstitutional. The judgment of the trial court is affirmed.

/s/ William Ray Price, Jr., Judge

Covington, Holstein, Thomas, Limbaugh, JJ., and Ahrens, Sp.J., concur; Robertson, C.J., dissents in separate opinion filed. Benton, J., not sitting.

DISSENTING OPINION

There is a single issue in this case: Whether a statewide use tax that places a higher tax burden on out-of-state purchases than is imposed by the sales tax on sales within Missouri violates the Commerce Clause of the United States Constitution. This question becomes all the more important when one considers that the use tax imposed by Missouri is higher in half of the taxing jurisdictions than is the sales tax. Elevating the cynic's conclusion about bureaucratic inefficiency to constitutional heights, the majority hold that the use tax scheme under scrutiny here is "close enough for government work." I respectfully dissent.

The case comes on cross-motions for summary judgment founded on the parties' stipulations of fact. Sales made in Missouri are subject to a statewide sales tax of 4.225%. Local taxing jurisdictions may also impose additional local sales taxes. The amount of local sales taxes imposed by local governments throughout Missouri is as high as an additional 3.5%, for a total tax of 7.725%.

Goods purchased outside of Missouri, but stored, used or consumed in Missouri are subject to a statewide use tax of 4.225%. The General Assembly, however, made no provision for offsetting local use taxes. As a result, instate sales were often subject to a higher overall sales tax than the use tax required for purchases of goods from other states. To remedy this competitive disadvantage for Missouri sellers, the legislature authorized an additional statewide use tax of 1.5%, making the aggregate use tax rate 5.725%, effective July 1, 1992.

The parties have stipulated that of the 1,573 taxing jurisdictions in Missouri, 841 (53.5%) of them have local sales taxes of less than 1.5%. Thus, in more than half of the taxing jurisdictions, the total use tax imposed on goods bought outside of Missouri is greater than the aggregate sales tax imposed on goods bought within the state. The State seeks to downplay this

obvious disparity by arguing that those 841 taxing jurisdictions account for only 6.86% of the taxable sales in Missouri and only 2.76% of the sales taxes collected in the state.

The State's use of these figures in misleading and, I respectfully submit, the majority's reliance on these figures is incorrect.

This case is an attack on the *use* tax; it is, therefore, irrelevant what percent of *instate* sales are made in those jurisdictions with local sales tax rates below 1.5%. Even if a "de minimis" exception to the Commerce Clause exists, and it does not, the relevant figure is the percentage of the total *out-of-state* purchases that are made by residents of these jurisdictions. Only this number would provide a true reading as to the amount of interstate commerce actually affected by the disparity between the aggregate use tax and the aggregate sales tax in more than half the state.

Unfortunately, the record provides no basis from which to calculate that number. The record does disclose, however, that approximately 26% of Missouri's population resides in these 841 taxing jurisdictions. The State concedes that the additional use tax is a burden on interstate commerce. Undaunted, the State argues that the additional use tax is not unconstitutional under the Commerce Clause because of the overall "de minimis" amount of discrimination that results in "practical operation". This argument is tantamount to a conclusion that 53.5% of the local taxing jurisdictions, and the 26% of the state's population that resides there, are constitutionally insignificant. I disagree.

The majority succumbs to this "close enough is good enough" theory, holding that "[w]hile in certain localities the use tax may exceed the sales tax" it is nonetheless not invalid under the Commerce Clause because it "does not discriminate against interstate commerce in purpose or practical effect." Maj. op. at 19, 20. The majority relies exclusively on *General American Tank Car Co. v. Day*, 270 U.S. 367 (1926), for the proposition

that the Commerce Clause does not forbid a state to tax the use of goods purchased out-of-state at a higher rate than the sale of goods instate.

In *General American,* Louisiana had a statewide, ad valorem tax on all property located within the state. Each parish and municipality also imposed additional, local ad valorem taxes on the same property. The state constitution, however, exempted nonresident railroads from these local property taxes. Therefore, the state passed an additional statewide ad valorem tax on all "rolling stock" located in Louisiana operated by non-domiciliary corporations. This created a situation in which non-domiciliary railroads had to choose between: (1) declaring residency in Louisiana and paying the lesser of the state-local combined ad valorem taxes, or (2) remaining a nonresident and paying the greater state-state combined property taxes. The parties stipulated that there were some, unspecified locales in the state where the state-local combination was less than the state-state combination. Though there was no evidence of the specific rates in any specific location, the state asserted that the statewide average local rate was equal to the additional state tax, thus making the average state-local burden the same as the state-state burden.

The taxpayer in *General American* challenged the additional statewide tax as unconstitutional under two theories — the Commerce Clause and the equal protection/due process clauses. It argued that the average statewide state-local burden was 4-mill less than the state-state burden and, therefore, the tax was "a thinly disguised attempt to compel nonresidents doing interstate business in Louisiana to declare a domicile in the state" in contravention of the Commerce Clause. The Court rejected the Commerce Clause challenge, stating:

> [I]t is obvious . . . that the tax in question is imposed on property of nonresidents in lieu of the local tax assessed in the several parishes of the state on property of persons or

> corporations domiciled there, and the nonresident may *either pay the state tax* assessed under [the state-state scheme] *or, at his option,* by becoming domiciled in a parish, *pay instead of it the local taxes* assessed [there].

Id. at 372. [Emphasis added.] This was the extent of the Court's Commerce Clause analysis in *General American.*

The remainder of the Court's decision in *General American,* including the portions upon which the majority in the present case bases its Commerce Clause holding, dealt exclusively with the taxpayers' challenge under the equal protection/due process clauses. The Court rejected these challenges, stating:

> *In determining whether there is a denial of equal protection* of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it s complementary.

Id. at 373 (*quoted at* Maj. op. at 15, in Section IV, which begins on page 10 and which details the "standard to be applied for determining whether discrimination [against interstate commerce] exists"). [Emphasis added.] The Supreme Court, speaking in dicta, extended its equal protection holding "even assuming" that the taxpayer's assertion of a 4-mill variance was correct:

> In the absence of a purpose to discriminate disclosed by the legislation itself we are not prepared to say that a 4 mills variation *in one year not shown to be a necessary and continuing result of the scheme of taxation* adopted would be an unconstitutional discrimination; for in such a scheme of complementary tax statutes however fairly devised it would be impossible to provide in advance against occasional inequalities as great as that here complained of.

Id. at 373-74. [Emphasis added.] The Court made clear, however, that "the record does not support the appellant's contention" of a variance. *Id.* at 374.

With respect, I believe *General American* is not controlling for at least four reasons. First, the majority relies on the due process and equal protection analysis in *General American* to support its conclusion that the Missouri additional use tax does not violate the Commerce Clause. The United States Supreme Court recently warned against confusing these two analyses.

> We have sometimes states that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . Due Process requirement[s]." *Trinova Corp. v. Michigan Dept. of Treasury,* 498 U.S. __, __, 111 S.Ct. 818, 828, 112 L.Ed.2d 884 (1991). Although such comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: a tax may be consistent with Due Process and yet unduly burden interstate commerce. *See, e.g., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue,* 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

Quill Corp. v. North Dakota, 112 S.Ct. 1904, 1914 n. 7 (1992). I believe the majority has confused Commerce Clause analysis with due process/equal protection analysis here.

Second, *General American* does not deal with a compensatory tax scheme such as the sales/use taxes in the present case. Rather, it deals with an ad valorem tax and considers how a state may tax the instate property of nonresidents where its local taxing authorities are prohibited from doing so by its own constitution.

Third, *General American* contains an abbreviated, and now highly suspect, Commerce Clause analysis. The Court held that the tax did not violate the Commerce Clause because the tax-

payer could "choose" the local taxes simply by declaring residence there. *General American*, 270 U.S. at 372. I do not believe such a justification for burdening interstate commerce would now pass constitutional muster.

> We find no authority for the . . . proposition advanced here that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business. Our cases suggest the contrary.

Kraft General Foods v. Iowa, 112 S.Ct. 2365, 2370 (1992) (*citing Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406 (1984) (discriminatory tax exemption struck on Commerce Clause grounds); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (use tax struck on commerce grounds for violating "strict rule of equality").

Fourth, the *General American* Court viewed the variation between instate/out-state tax burdens as "an occasional inequalit[y]" that had occurred "one year" due to discrepancies in application "impossible" to avoid. The Court specifically distinguished these variances from ones that are "a necessary and continuing result of the scheme of taxation." Such a conclusion is in sharp contradistinction to the present case, where the additional use tax — by virtue of the very "local option" sales taxes it ostensibly seeks to offset — must necessarily impose a continuing unconstitutional burden upon interstate commerce in that half of the state that has not elected to levy a 1.5% or higher local sales tax.

In its reliance on *General American*, the majority ignores a substantial line of authority reviewing the constitutionality of sales/use tax schemes under the Commerce Clause.

The United States Supreme Court's first detailed Commerce Clause analysis of a sales/use tax scheme is in *Henneford v. Silas*

Mason Co., 300 U.S. 577 (1937). There, the State of Washington sought to compensate for the damage done to the competitive abilities of is instate sellers by the state's 2% sales tax by imposing a 2% tax on the "use" of goods in Washington that were bought out-of-state. The Court upheld this statutory scheme, stating:

> *Equality* is the theme that runs through all the sections of the statute. . . . When the account is made up, the *stranger from afar is subject to no greater burdens* as a consequence of ownership than the dweller within the gates. . . . Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. *In each situation the burden borne by the owner is balanced by an equal burden where the share is strictly local.*

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), involved a similar compensatory scheme of taxation. The state supreme court ignored certain inequalities in the taxation scheme and upheld the taxes on the grounds that those inequalities were merely "incidental." The United States Supreme Court expressly rejected Louisiana's creation of a "de minimis" (close enough for government work) exception to the Commerce Clause.

> The conclusion is inescapable: *equal treatment* for instate and out-of-state taxpayers similarly situated is the *condition precedent* for a valid use tax on goods imported from out-of-state.

Id. at 70. The Court applied a strict rule of equality to its measure of "equal treatment." "[E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Id.* Because the Louisiana tax imposed

a greater burden on out-of-state goods than on local sales, the Court struck down the Louisiana statutory taxes as violative of "the *strict rule* of equality adopted in [*Henneford*]." *Id.* at 73. [Emphasis added.]

Unlike *General American*, which has been cited only twice by the United States Supreme Court in the sixty-seven years since it was written, *see Gregg Dyeing Co. v. Query*, 286 U.S. 472, 482 (1932) (citing *General American* for its due process analysis only); *Charleston Federal Savings & Loan Ass'n.*, 324 U.S. 182, 190 (1945) (same), *Henneford* and *Halliburton* have become principal mainstays of the Court's Commerce Clause jurisprudence. *See, e.g., Tyler Pipe*, 483 U.S. at 245-46 (*citing Henneford* and *Halliburton* for the principle that "equal treatment" is the constitutional prerequisite for a valid use tax under the Commerce Clause); *Williams v. Vermont*, 472 U.S. 14, 23 (1985) (same); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) (same).

Through its Commerce Clause cases, the Court has repeatedly and expressly rejected attempts to justify facially discriminatory taxes on the grounds that the discrimination was merely "de minimis." After holding the system of credits and exemptions allowed under Louisiana's ostensibly neutral "first use" tax to be unconstitutional, the Court struck down the tax and rejected a plea to remand for a hearing to determine the extent of the actual discrimination against interstate commerce, stating that "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. at 760.

In *Westinghouse Electric*, the New York taxing authorities tried to salvage a facially-discriminatory tax on the grounds that the discrimination was "de minimis." The Court states that "the extent of the discrimination does not affect our analysis," because "the Court need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Westinghouse Electric*, 466 U.S. at 407, n. 13.

Similarly, in *Bacchus Imports, Ltd. v. Dias*, 488 U.S. 263 (1984), the Court refused to look the other way while Hawaii exempted from its 20% excise tax on wholesale liquor sales two varieties of tropical wines produced on the islands. Rejecting the state's argument that the discrimination was "de minimis" because the sale of these local wines was less than 1% of the total liquor sales, the Court stated that "[i]t is well-settled the '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 269. The Court struck the entire forty-five million dollar tax, not just the exemption, on the basis of the state's discrimination in under one percent of sales.

"The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U.S. at 759. *See also Tyler Pipe*, 483 U.S. at 243 (same); *Boston Stock Exchange, v. State Tax Comm'n.*, 429 U.S. 318, 331 (1977) (same). Thus a compensatory tax must, in actuality, be compensating for something. *Maryland v. Louisiana*, 451 U.S. at 758 ("first-use" tax struck because it did not compensate for a burden placed local goods).

No better summary of the relevant law is possible than that given by the Court when, after reviewing its use tax jurisprudence, it stated:

> In all the use tax cases, an individual faced with the choice of an instate or out-of-state purchase could make that choice *without regard to the tax consequences*. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax *of the same amount*. The taxes treated both transactions in the same manner.

Boston Stock Exchange, 429 U.S. at 332 [Emphasis added.] In the present case, Missouri's 1.5% additional use tax is unconsti-

tutional under this standard, by the parties own stipulations, in more than half the state. As such, it cannot stand.

A fair reading of the relevant cases, I believe, compels the conclusion that there is no de minimis exception to the Commerce Clause. The duty exacted by a state must be the same whether the goods subject to taxation originated instate or out-of-state — all of the time and in all of the state. Such a result is consistent with the view announced in *Quill Corp.* that "a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals." 112 S.Ct. at 1915.

Rather than draft a use tax that would conform to this bright-line, long-standing rule of constitutional law, the General Assembly made a rough "estimate" and assessed a flat 1.5% additional tax. The legislature's solution fails to ensure the equality required by the Commerce Clause.

With respect, I do not believe the constitutionality of Missouri's tax scheme here is even fairly debatable. This state's tax is simply unconstitutional.

/s/ Edward D. Robertson, Jr.
Chief Justice

APPENDIX B

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Case No. CV192-15CC

ASSOCIATED INDUSTRIES OF MISSOURI
and ALUMAX FOILS, INC.,
Plaintiffs,

v.

RAYMOND T. WAGNER, JR.,
DIRECTOR OF REVENUE,
Defendant,

and

DELONG'S INCORPORATED,
CITY OF BLUE SPRINGS, GARY MARKENSON,
MISSOURI MUNICIPAL LEAGUE, and ASSOCIATED
GENERAL CONTRACTORS OF MISSOURI,
Intervenor-Defendants.

JUDGMENT

This cause involves constitutional challenges asserted by Plaintiffs Associated Industries of Missouri and Alumax Foils, Inc., to the provisions of Section 144.748, RSMo. (Supp. 1991), which became effective on July 1, 1992. Section 144.748, RSMo. (Supp. 1991), provides for an additional one and one-half percent (1.5%) use tax for local purposes, said tax sometimes being referred to as the "Local Use Tax" or "Additional Use Tax." The 1.5% Additional Use Tax is in addition to the 4.225% use tax provided in Section 144.610, RSMo.

The Defendant Raymond T. Wagner is the Director of Revenue who, under Section 144.748, RSMo, (Supp. 1991), is charged with collecting the Additional Use Tax. The Court

permitted DeLong's, Incorporated, the City of Blue Springs, Gary Markenson, the Missouri Association of Counties, the Missouri Municipal League and the Associated General Contractors of Missouri to intervene as Intervenor-Defendants.

Plaintiffs' principal challenge to the Additional Use Tax is predicated upon the Commerce Clause of Article I, Section 8, of the United States Constitution. Plaintiffs also assert that the Additional Use Tax violates the Equal Protection, Due Process and Uniformity Clauses of the Missouri Constitution, Article I, Sections 2 and 10, and Article X, Section 3, respectively, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs also allege that Section 144.748, RSMo. (Supp. 1991), violates Sections 1, 10(a), 16 and 22 of Article X and Section 28 of Article IV of the Missouri Constitution.

The Federal Commerce Clause challenge is predicated upon the assertion that because the aggregate rate of local sales taxes in some locales in Missouri is less than 1.5%, the 1.5% Local Use Tax constitutes an unconstitutional burden upon interstate commerce. The lesser aggregate local sales tax in some locales when compared with the 1.5% Local Use Tax is also the basis for certain of the other assertions of unconstitutionality made by the Plaintiffs. Defendants and the Intervenor-Defendants assert that the Additional Use Tax is constitutional, and Intervenor-Defendants alternatively assert that the Additional Use Tax should be upheld in locales where the aggregate local sales tax rate is 1.5% or more.

Prior to the trial of this cause on June 24, 1992, the Plaintiffs had filed their Motion for Summary Judgment. Affidavits and counter-affidavits were filed, and the Court heard oral arguments with respect to the Motion for Summary Judgment on June 5, 1992. Thereafter, further written suggestions were filed. The Court then entered its order that the Motion for Summary Judgment would be taken with the case.

At the trial of this case on June 24 the parties appeared by their respective counsel. An extensive Stipulation of Facts was filed, in which all parties joined. Further matters were stipulated to on the record by counsel, and by agreement depositions which had been taken in this case were made a part of the trial record. The Court also heard testimony from the chief executive officer of DeLong's, Incorporated. Subsequent to the trial, the respective parties filed post-trial suggestions.

The Court has carefully considered the record herein and the extensive memoranda of law which have been provided by counsel for the parties. After such consideration, the Court finds the issues in favor of the Defendant and the Intervenor-Defendants and against the Plaintiffs.

While the Court does not believe it necessary to discuss all of the issues, it is appropriate to note briefly some of the considerations which the Court believes to be particularly pertinent. From the data in the Fiscal Note (Exhibit H to the Stipulation of Facts) for Section 144.748 RSMo. (Supp. 1991), with respect to sales subject to use tax in fiscal year 1989, it appears that had the Additional Use Tax been in effect in that fiscal year the additional 1.5% tax rate would have generated $48,142,904.43 in revenues. The Fiscal Note projects revenues of $58,518,001 from the Additional Use Tax in fiscal year 1993.

While there are some sales in Missouri that are not subject to a local sales tax and still other sales that are subject to a local sales tax of less than 1.5%, the evidence indicates that in calendar year 1990, 92.14% of the sales in Missouri which are subject to sales taxes were subject to an aggregate local sales tax rate of 1.5% or more. 55.32% of the sales in Missouri in calendar year 1990 were subject to an aggregate local sales tax rate in excess of 1.5%, with the local aggregate rates going as high as 3.5%. The record herein reflects that for calendar year 1990, intrastate sales in Missouri were subject to a local sales tax burden of approxi-

mately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales.[1]

The evidence also indicates, and the Court finds, that the overwhelmingly predominant local sales tax rates in Missouri will remain at 1.5% or higher for so long as Section 144.748, RSMo. (Supp. 1991), remains in effect. This is supported by Exhibits I and J to the Stipulation. It is also supported by the fact that the revenue generated by the Local Use Tax is distributed to local jurisdictions in proportion to the amount of local sales tax revenues they receive, which provides an affirmative incentive to maintain or increase their local sales tax rates.

The Court therefore specifically finds that the Additional Use Tax is not discriminatory *vis-a-vis* local sales taxes and that the Additional Use Tax does not constitute a burden upon interstate

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[1] Exhibit E to the Stipulation of Facts is a computer run from the Department of Revenue reflecting for calendar year 1990 the sales subject to sales taxes on a locale by locale basis across Missouri. Exhibit E also reflects the aggregate local sales tax rates for each locale in 1992. In calendar year 1990 there were $35,663,398,847.22 of total sales subject to Missouri sales taxes. Exhibit E demonstrates that if the 1992 aggregate local sales tax rates are applied on a locale by locale basis to the sales in each locale, such would generate $645,869,767.55 in local sales taxes. If a uniform 1.5% local sales tax rate is applied across the board to all 1990 sales subject to Missouri sales tax, such would generate local sales taxes in the amount of $534,950,982.71. From an examination of Exhibits I and 8, it is apparent that the changes in local sales taxes between 1990 and 1992 have been minimal, with there being some net increases. A recalculation of the data on Exhibit E using the actual local sales tax rates in effect in 1990 would result in a slightly lesser amount of actual local sales taxes than the $645,869,767.55 above indicated. The Fiscal Note (Exhibit H) for Section 144.748, RSMo. (Supp. 1991), indicates that for *fiscal* year 1989, there were local sales tax collections of $653,364,663. It is apparent to the Court, and the Court so finds and concludes, that intrastate sales in Missouri in calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales.

commerce. The Court further specifically finds an absence of any intent by the General Assembly in enacting Section 144.748, RSMo. (Supp. 1991), to discriminate against interstate commerce, and the Court further finds that there was an intent to create an equitable and workable system. The Court believes that this case falls within the rationale of *General American Tank Car Corporation v. Day*, 270 U.S. 367 (1926). Neither the United States Constitution nor the Missouri Constitution require mathematical exactness in the operation of these taxes. The Court concludes that Section 144.748, RSMo. (Supp. 1991), passes the four part test set forth in *Complete Auto Transit. Inc. v. Brady*, 430 U.S. 274 (1977).

The Court believes that the application and operation of the Local Use Tax and the local sales taxes must and should be considered, and that the constitutionality of the Local Use Tax cannot be ruled by facial considerations alone.

The Court concludes, after considering the record and legal memoranda submitted, that all of the constitutional challenges of the Plaintiffs must fail.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

1. The Plaintiffs' Motion for Summary Judgment be and the same is hereby overruled.

2. The provisions of Section 144.748, RSMo. (Supp. 1991), which became effective on July 1, 1992, do not violate the provisions of Section 8 of Article I or the Fourteenth Amendment of the United States Constitution nor do they violate the provisions of Section 2 or 10 of Article I, Sections 1, 3, 10(a), 16 or 22 of Article X, or Section 28 of Article IV of the Missouri Constitution.

3. The Plaintiffs are denied relief upon their Petition, including both the declaratory and injunctive relief sought therein.

4. Costs are taxed to Plaintiffs.

/s/ James F. McHenry
Circuit Judge

Dated: July 15, 1992

No. 93-397

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ASSOCIATED INDUSTRIES OF MISSOURI AND ALUMAX FOILS, INC.,

Petitioners,

v.

JANETTE M. LOHMAN, DIRECTOR OF REVENUE, AND DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, AND THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

BRIEF OF RESPONDENTS, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, AND THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-397

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ASSOCIATED INDUSTRIES OF MISSOURI AND ALUMAX FOILS, INC.,

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OPINIONS BELOW

The Opinion (joined in by 6 of the 7 Judges) of the Missouri Supreme Court and the Dissenting Opinion filed June 29, 1993, are reproduced as Appendix A to the

Petition for Writ of Certiorari. The unreported Judgment of the Circuit Court of Cole County dated July 15, 1992, is reproduced as Appendix B to the Petition for Writ of Certiorari at A-35.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Supreme Court was entered on June 29, 1993. Petitioners did not file a motion for rehearing as is authorized by Rule 84.17, Missouri Rules of Civil Procedure. Petitioners assert jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, the following provisions are noted:

CONSTITUTION OF MISSOURI, Article X, § 1:

> "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

CONSTITUTION OF MISSOURI, Article X, § 10(b):

> "Nothing in this constitution shall prevent the enactment of general laws directing the payment of funds collected for state purposes to counties or other political subdivisions as state aid for local purposes."

The Missouri General Assembly has authorized local governments (primarily counties and municipalities) in Missouri to impose multiple sales taxes on sales of tangible personal property sold within their jurisdictions. These are authorized, *inter alia*, by Sections 66.600 to 66.635, 67.500 to 67.545, 92.400 to 92.420, 94.500 to 94.519, 94.600 to 94.655, and 94.700 to 94.745, RSMo. There are no Missouri statutes which authorize local governments in Missouri to impose use taxes.

STATEMENT OF THE CASE

Associated Industries of Missouri ("AIM") and Alumax Foils, Inc. ("Alumax"), initiated this case challenging the constitutionality of the local use tax which was authorized by Section 144.748, RSMo. Supp. 1991. The trial court, after a trial, upheld the constitutionality of the local use tax law. The Missouri Supreme Court, *en banc*, affirmed in a 6-1 decision.

Missouri imposes a statewide sales tax for state purposes of 4.225 percent of the sales price of tangible personal property sold in Missouri, and compensating use taxes for state purposes of 4.225 percent of the sales price of tangible personal property sold outside of Missouri but stored, used or consumed in Missouri. For a number of years, the Missouri General Assembly through various statutes[1]

[1] These statutory enactments include Sections 94.510, 94.577, 94.600, 94.700, 66.600, 67.391, 67.505, 67.547, 67.550, 67.581, 67.582, 67.583, 67.590, 67.700, 67.729, 67.730, 67.734 and 67.782, RSMo.

has authorized counties and municipalities[2] to levy sales taxes. The aggregate of the local sales taxes imposed by a county and a municipality at some locations in Missouri is as high as 3.3 percent above the 4.225 percent statewide sales tax. In 1990 the Missouri General Assembly, by enacting Section 144.747, RSMo, authorized political subdivisions which had adopted local sales taxes to adopt local use taxes, as well, following the same procedures. To adopt local sales taxes, the local political subdivisions generally had to follow certain procedures specified by statute, including conducting a local election to approve the sales tax. No political subdivision adopted a local use tax pursuant to Section 144.747, RSMo. Section 144.748, RSMo. Supp. 1991, authorizes an additional statewide use tax in the amount of 1.5 percent, which is distributed to local political subdivisions for local use.

Alumax is a corporation with its principal place of business located in the City of St. Louis. There is no evidence in the record that Alumax conducted business at other locations in Missouri. The aggregate of local sales taxes within the City of St. Louis is 1.5% – the same rate as the local use tax here being challenged. AIM is, as its name indicates, an association of companies having operations in Missouri. The record does not establish that AIM has members which are located at places in Missouri where the combined local sales tax rate is less than 1.5 percent.

---

[2] Generally, Missouri counties and municipalities are the only local political subdivisions authorized by statute to adopt local sales taxes. Local sales taxes were authorized for the support of one school district in Missouri.

The named Defendant (a Respondent) in his action is the Director of the Missouri Department of Revenue (the "Director"). The Director collects all sales and use taxes in Missouri, including sales taxes levied locally and the local use tax. With respect to local sales taxes and the local use tax, a small percentage of the amounts collected goes into the general revenue of the state to cover expenses of administration and collection, and the balance is then remitted to the counties and municipalities which have adopted local sales taxes on a pro-rata basis.

There are 114 counties in Missouri plus the City of St. Louis. One hundred twelve of the Missouri counties are members of Intervenor Defendant The Missouri Association of Counties (a Respondent here). Intervenor Defendant Missouri Municipal League (a Respondent here) represents the interests of 540 Missouri municipalities. Intervenor Defendant City of Blue Springs (a Respondent here) is a Missouri municipality. The combined local sales rate within Blue Springs (including both those imposed by the City itself and by Jackson County) is 2.25 percent. Intervenor Defendant DeLong's, Incorporated (a Respondent here) is a steel fabricator located in Jefferson City where there is a combined local sales tax rate of 2 percent. Even with a 1.5 percent local use tax on steel products shipped into Missouri, DeLong's, Incorporated, is at a competitive disadvantage with respect to its steel products sold from Jefferson City because of the very small profit margin in the steel fabrication business. Intervenor Defendant Associated General Contractors of Missouri (a Respondent here) is a trade association of general contractors in Missouri and Intervenor Gary Markenson (a

Respondent here) is a citizen and taxpayer of Jefferson City where the combined local sales tax rate is 2 percent.

In Missouri local sales taxes are imposed at the tax rate in effect at the location of the seller – even if the seller delivers the goods purchased to the buyer at a location where the combined local sales tax rate is higher or lower than that in effect. *Fabick & Co. v. Schaffner,* 492 S.W.2d 737 (Mo. 1973). The Missouri Supreme Court has indicated that use taxes in Missouri are imposed at the location of the first place in the state at which a buyer exercises the privilege of storing or consuming the tangible personal property, *Kansas City Power & Light Co. v. Director of Revenue,* 783 S.W.2d 910 (Mo. banc 1990), though it has not been necessary to decide whether the use tax should be imposed at one location within the state rather than another location within the state.

The figures of "1573 taxing jurisdictions in Missouri" with "841" of those having an "aggregate sales tax" of less than 5.725 percent referred to by Petitioners in their Petition (page 3) are not in the record. That assertion is also misleading. There are "taxing jurisdictions" in Missouri other than counties and municipalities, but *only* counties and municipalities have statutory authority to impose local sales taxes in addition to the combined 4.225% statewide sales tax rate. It is known that there are 114 counties in Missouri plus the City of St. Louis. Only two small counties do not have a local sales tax. The precise number of municipalities in Missouri is not in the record, though there are at least 540 municipalities. With the exception of the City of St. Louis (which has a combined local sales tax rate of 1.5 percent, which with the 4.225 percent state sales tax rate aggregates a rate of 5.725

percent), when a seller is located within a municipality a sale may be subject to local sales taxes authorized by different taxing authorities – both local sales taxes levied by the county (which may be multiple taxes) and local sales taxes levied by the municipality (which also may be multiple taxes).

The record herein reflects that at the time of the enactment of Section 144.748, RSMo. Supp. 1991, providing for the 1.5 percent local use tax here challenged, the then Missouri Director of Revenue had presented to the Missouri General Assembly data with respect to the amount of sales in Missouri during 1990 third quarter which were subject to the various aggregate sales tax rates (combined state and local) in effect in Missouri. That 1990 third quarter data is also in the record in this case, as follows:

Combined Local Sales Tax Rate	Aggregate State and Local Sales Tax Rate	Amount of Sales Subject to Aggregate Tax Rate	Percent of Total Missouri Sales
3.5%	7.725%	546,209	.01%
3.0%	7.225%	78,156,177	.85%
2.75%	6.975%	35,148,134	.38%
2.625%	6.85%	571,926	.01%
2.5%	6.725%	649,940,690	7.10%
2.375%	6.6%	5,404,593	.06%
2.25%	6.475%	1,826,949,717	19.96%
2.125%	6.35%	163,085,316	1.78%
2.0%	6.225%	1,155,171,732	12.62%
1.875%	6.1%	33,312,842	.36%
1.75%	5.975%	899,261,373	9.82%
1.525%	5.858%	14,198,470	.16%

Percent of total sales in Missouri subject to combined local sales taxes in excess of 1.5 percent –			53.11%
1.5%	5.775%	3,555,320,700.56	38.84%
Percent of total sales in Missouri subject to combined local sales taxes equal to or in excess of 1.5 percent –			91.85%
1.375%	5.6%	46,722,463	.51%
1.25%	5.475%	8,528,222	.09%
1.0%	5.225%	257,546,619	2.81%
.875%	5.1%	19,496,338	.21%
.75%	4.975%	55,837,734	.61%
.625%	4.850%	13,073,192	.14%
.5%	4.725%	288,961,923	3.16%
.375%	4.6%	10,767,694	.12%
Percent of total sales in Missouri subject to combined local sales taxes of less than 1.5 percent –			7.65%
Percent of total sales in Missouri for period subject to local sales taxes –			99.6%
-0-	4.225%	36,561,707	.40%
Percent of total sales for period in Missouri not subject to a local sales tax –			.40%

For all of 1990, had a uniform local sales tax *limited* to a tax rate of 1.5 percent been applied to all sales subject to sales tax in Missouri, such would have resulted in local sales taxes totaling $534,950,982.71. In actuality, because of combined local sales tax rates in effect in many localities of in excess of 1.5 percent, *over* $100,000,000 *more* in local sales taxes were collected (A37-38, Petition). Consequently, even with the imposition of a local use tax of 1.5 percent, sales in intrastate commerce in Missouri

are subject to an annual local sales tax overburden of approximately $100,000,000 more than the sales made in interstate commerce.

While there are some areas of Missouri where there are combined local sales taxes of 1.5 percent or less in effect, over 92% of the sales in Missouri are made by businesses which are located within municipalities where both the municipality and county impose combined sales taxes of 1.5 percent or more. Only a few scattered businesses accounting for only .4% of the total sales subject to sales tax in Missouri are located in areas where there is no local sales tax.

The record reflects, and the trial court so found (page A38, Appendix B, Petition) that the predominant local sales tax rates will remain at 1.5% or higher for so long as Section 144.478, RSMo. Supp. 1991, remains in effect.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS DID NOT EXHAUST THEIR RIGHTS OF REVIEW BEFORE THE MISSOURI SUPREME COURT.

The Missouri Supreme Court issued the Opinion of the Court and the Dissenting Opinion of one of its Judges on June 29, 1993. Rule 84.17, Missouri Rules of Civil Procedure, authorizes a party to file a motion for rehearing within 15 days after the Court's Opinion is filed. The purpose of such motion as set forth in that Rule " . . . is to

call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its Opinion."

Petitioners could have filed a motion for rehearing in the Missouri Supreme Court with respect to that Court's Opinion of June 29, 1993, and should have done so if they believed that "material matters of law . . . [were] misinterpreted by the court." Petitioners, however, failed to file a motion for rehearing with the Missouri Supreme Court. Inasmuch as Petitioners failed to exhaust their rights of review before the Missouri Supreme Court pursuant to the Missouri Rules of Civil Procedure, the Supreme Court of the United States should *not* exercise its discretion and issue a writ of certiorari to review the decision of the Missouri Supreme Court.

And while the Opinion below was not a Divisional Opinion of the Missouri Supreme Court as was the case in *Osment v. Pitcairn*, 317 U.S. 587 (1942), where this Court found that the failure to file an after opinion motion in the Missouri Supreme Court was fatal to this Court's jurisdiction to issue a writ of certiorari, the United States Supreme Court should nevertheless decline to issue a writ of certiorari when Petitioners who are sophisticated litigants failed to avail themselves of a further avenue for review and reconsideration provided by the Rules of the Missouri Supreme Court.

II. PETITIONERS DO NOT HAVE STANDING IN THIS COURT UPON THE RECORD IN THIS CASE TO CHALLENGE THE CONSTITUTIONALITY OF MISSOURI'S LOCAL USE TAX LAW.

In *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), this Court set forth a three-prong test that must be met before a plaintiff has standing in this Court to raise a challenge to governmental action – (1) the plaintiff must have suffered an "injury in fact", i.e., an invasion of a legally-protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Petitioners do not meet all three of these tests, and consequently Petitioners do not have standing to seek a writ of certiorari to review the decision of the Missouri Supreme Court.

While the Missouri Supreme Court determined that the Petitioners had standing *under Missouri law* to raise constitutional challenges to the local use tax law, that decision is not determinative of standing before this Court under Federal law.

For Petitioners to demonstrate standing under Federal law to raise a Federal constitutional challenge to Section 144.748, RSMo. Supp. 1991, authorizing a local use tax in Missouri, they must clearly demonstrate that they have paid local use taxes at a particular location (or perhaps clearly demonstrate that they will actually pay

local use taxes at such particular location – not a "conjectural or hypothetical" payment) which are in excess of the local sales taxes which are imposed at that location. Only by such a clear demonstration can an "injury in fact" be shown.

Local sales taxes in Missouri are imposed at the aggregate tax rate in effect at the place of business of the seller, and even if the seller delivers the goods to the purchaser at a location where there is a lesser aggregate local sales tax rate in effect (or no local sale tax rate in effect), the aggregate local sales tax rate charged is that which is in effect at the place of business of the seller. *Fabick & Co. v. Schaffner,* 492 S.W.2d 737 (Mo. 1973). Use taxes, however, are considered to be imposed at the time and place in the state at which the taxpayer exercises the privilege of storing or consuming the tangible personal property subject to use tax.

The record reflects that Alumax has a principal place of business within the City of St. Louis where the aggregate local sales tax rate is 1.5 percent. The record does *not* reflect any other business location in Missouri at which Alumax takes delivery of goods. Similarly, the record is devoid of any evidence that AIM or any of its members have a business location in Missouri at which it takes delivery of goods and at which the aggregate local sales tax rate in effect is less than 1.5 percent. Alumax and AIM have therefore not shown any "injury-in-fact" by the demonstration of a higher local use tax in effect at a location where they take deliveries of goods than the aggregate local sales tax rate in effect at such location.

The record does reflect that Alumax and some members of AIM pay use taxes. The record also reflects that some members of AIM pay local sales taxes on some purchases from Missouri sellers at a rate of less than 1.5 percent. But, since the local sales taxes are imposed at the seller's place of business rather than at the buyer's business location as is the case with a use tax, Petitioners have not demonstrated a local sales tax rate which is lower than the local use tax at their business locations. Hence, they have not demonstrated an "injury-in-fact" so as to have standing to challenge the constitutionality of the local use tax law.

III. MISSOURI'S UNIFORM LOCAL USE TAX LAW REDUCES THE EXISTING LOCAL SALES TAX OVERBURDEN ON INTRASTATE COMMERCE, DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE, CAN BE RATIONALLY AND READILY UNDERSTOOD AND APPLIED BY ALL INVOLVED, AND DOES *NOT* VIOLATE THE COMMERCE CLAUSE.

While Petitioners before the Missouri trial court and the Missouri Supreme Court attempted to assert multiple Federal and state constitutional challenges to Missouri's local use tax law, Section 144.748, RSMo. Supp. 1991, Petitioners' challenge here is predicated solely upon the Federal Commerce Clause – Article I, Section 8, Clause 3, United States Constitution. Even assuming, *arguendo,* that this court determines that the grounds set forth under I and II, *supra,* are not valid reasons for denying the Petition, the Missouri Supreme Court in its Opinion of June 29, 1993 (pages A-1-24, Appendix A to Petition) fully

considered the Federal Commerce Clause issue and correctly decided that the Missouri local use tax law did *not* violate the Federal Commerce Clause. It is clear from a consideration of the Opinion by Judge Price on behalf of six of the seven Judges participating in the case that the arguments here advanced by Petitioners in their Petition were considered by the Missouri Supreme Court and were properly rejected. Petitioners offer no compelling reasons why the decision of the Missouri Supreme Court, which follows the controlling precedent of this Court in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925), should be further considered.

The first case cited by Petitioners under their first reason for granting the writ, *Freeman v. Hewitt*, 329 U.S. 249 (1946) (page 7 of Petition), was specifically discredited by this Court in *Complete Auto Body Transit, Inc. v. Brady*, 430 U.S. 274 (1977), when it specifically overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). In discussing *Freeman*, the progenitor of *Spector*, this Court in *Complete Auto Body* noted:

> "The rule announced in Freeman was viewed in the commentary as a triumph of formalism over substance, providing little guidance even as to formal requirements." 430 U.S. at 281.

Petitioners assert the discredited approach of "formalism over substance" in determining whether a state tax imposes an unconstitutional burden upon interstate commerce under the Commerce Clause. It is the third prong of the four-prong test set forth in *Complete Auto Body* which is to be considered here – whether or not the tax "discriminate(s) against interstate commerce."

In determining that the Missouri local use tax law as applied does *not* discriminate against interstate commerce and therefore does *not* violate the Commerce Clause, both the trial court and the Missouri Supreme Court properly relied upon and followed *General American Tank Car Corp. v. Day, supra* (per Justice Stone for a unanimous court, which included Justices Holmes, Brandeis and Taft). *General American* has not been overruled or questioned by any later decision of this Court and is controlling.

In *General American* a Commerce Clause (along with an Equal Protection) challenge was made to a Louisiana taxing scheme which taxed the rolling stock of *non-residents* doing interstate business at 25 mils on the dollar at the state level while tax rates on the rolling stock of taxpayers domiciled in Louisiana were locally taxed at varying amounts:

> "In some parishes, local taxes exceed twenty-five mils, and in others they are less than that amount; but it is asserted by the appellee that the *average of all local property taxes* is approximately twenty-five mils." (emphasis added). 270 U.S. at 371.

There was evidence in *General American* that some of the rolling stock of Louisiana companies were taxed at rates *less* than 25 mils on the dollar, and in some parishes the rate of local taxes was as high as 31 mils on the dollar. This Court in *General American* rejected the Commerce Clause challenge and upheld the constitutionality of the Louisiana taxing scheme. In rejecting the Commerce Clause challenge, this Court in *General American* reasoned:

"There being no question as to the amount of the tax or the method of its computation, the taxation of appellants' property within the State can be open to no objection unless it operates to discriminate in some substantial way. . . .

* * *

"We are not concerned with the particular method adopted by Louisiana of allocating the tax between the State and its political subdivisions. That is a matter within the competency of the state legislature.

* * *

"The court below found, as did the state Supreme Court in *Union Tank Car Co. v. Day, supra,* that all *local taxes throughout the State* from which appellants are exempted by the Louisiana constitution, *average approximately twenty-five mils,* and that, *since the tax assessed* under § 5 *was substantially the equivalent* of the local tax in lieu of which it was assessed, *there was no unjust discrimination.*

* * *

"Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, *it is not invalid merely because equality in its operation has not been attained with mathematical exactness."* (emphasis added) 270 U.S. at 372-373.

The Court in *General American,* in determining whether the state levied tax on rolling stock in interstate commerce was discriminatory was concerned with whether the *average* of the local imposed tax upon rolling

stock of domestic companies was less than the uniform state rate. When it was determined that the average local rate was "approximately 25 mils" as compared with the uniform state rate of 25 mils on the rolling stock in interstate commerce, this Court concluded that there was no improper discrimination shown and therefore there was no violation of the Commerce Clause. In reaching its conclusion in *General American,* this court relied upon *Travellers' Insurance Company v. Connecticut,* 185 U.S. 364 (1901), which had in turn reasoned:

> "The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate [for non-residents] for special taxation and valuation for the property [of residents] subject to widely varying rates for municipal taxation, was to *approximate a general equality in the burden* that should fall on the two classes of property. . . . " (emphasis added) 185 U.S. at 368.

Here, the average combined local sales tax rate is substantially higher than 1.5 percent – as evidenced by the fact that if sales in intrastate commerce subject to sales tax were uniformly taxed at only a local sales tax rate of 1.5 percent, such would result in a *decrease* of over $100,000,000 in local sales taxes raised annually. Approximately 53.11% of all taxable sales in Missouri in intrastate commerce are subject to a combined local sales tax rate in excess of 1.5 percent, and approximately 38.84% of all taxable sales in Missouri in intrastate commerce are subject to a combined local sales tax rate equal to the local sales tax rate of 1.5 percent.

A review of the local sales tax rates in the record reflects that those rates are generally higher in areas where commercial activity is concentrated. Sales within the City of St. Louis, the City of Kansas City and St. Louis County which are subject to a sales tax are all subject to a combined local sales tax rate equal to or in excess of 1.5 percent.

Petitioners rely principally upon *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), just as they did before the Missouri Supreme Court. Judge Price, speaking for the Missouri Supreme Court in the Opinion of June 29, 1993, quite properly distinguished each of those cases. See Appendix A to the Petition. The rationale of Judge Price in distinguishing those cases need not be repeated but is instead incorporated by reference here. It is further noted that both *Halliburton and Boston Stock Exchange* predated the seminal decision in *Complete Auto Body*, so to the extent, if any, that *Halliburton and Boston Stock Exchange* are not in harmony with the discrimination prong of the *Complete Auto Body* test, they are distinguishable. Furthermore, neither *Halliburton, Boston Stock Exchange, Maryland v. Louisiana, Bacchus Imports*, nor any other case by this Court relied upon by the Petitioners in their Petition involved an analogous situation to that which is here present – where the tax on transactions in intrastate commerce was on average much higher than the uniform tax on transactions in interstate commerce.

Under the decisions of this Court, contrary to the suggestions of the Petitioners, a state may properly require those engaged in interstate commerce to pay their just share of the tax burden:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Western Live Stock v. Bureau of Revenue*, 300 U.S. 250, 254 (1938).

While Petitioners complain of an uniform local use tax rate of 1.5 percent, the realities are that an uniform local use tax rate of 1.5 percent set forth in Section 144.748, RS Mo. Supp. 1991, is under the situation existing in Missouri the fairest, most workable and least discriminatory of the local use tax alternatives. Consider, for example, the following:

1. The uniform local use tax rate of 1.5 percent and the mechanism set forth in Section 144.748, RSMo. Supp. 1991, results in the taxpayers subject to use taxes paying less taxes on average than would be the case if the varying aggregate local sales tax rates were in effect.

2. It is impossible to tie a local use tax rate precisely to an aggregate local sales tax rate inasmuch as local sales taxes are levied at the location of the seller's business whereas local use tax rates, if tied to a particular location in the state, would be tied to the first place in Missouri at which the taxpayer exercises the privilege of storing or consuming the tangible personal property subject to use tax. Consequently, under the perfect

equality rationale (which does not in fact exist in the taxing area) of the Petitioners, since the local sales taxes upon a sale in intrastate commerce are levied at a different location than a local use tax with respect to a comparable sale in interstate commerce, perfect "equality" is not possible. Therefore, under Petitioners' rationale, no local use tax could be properly levied. What Petitioners are in effect ultimately seeking to avoid is *any* compensating local use tax. Such is contrary to the concept expressed in *Western Live Stock* that interstate commerce should bear its fair share of the state and local tax burden.

3. A uniform local use tax rate of 1.5 percent avoids the administrative nightmares which would be encountered if local use tax rates were required to be identical in all instances to the combined local sales tax rate at every location within the state. These are administrative nightmares for the out-of-state seller required to collect the local use tax, the taxpayer, and the Director of Revenue in collecting the tax. As an example, let us assume that a Missouri resident with a post office address of Excelsior Springs, Missouri, purchases goods out of state from a seller who has a sufficient nexus with Missouri to be subject to a requirement to collect Missouri use taxes. The goods are shipped to an Excelsior Springs address. From the record in this cause, if the goods are received at the purchaser's address, it can be discerned that (i) if the purchaser lives within that part of Excelsior Springs which is in Ray County the combined local sales tax would be 3.5

percent, (ii) if the purchaser lives within that part of Excelsior Springs which is in Clay County the combined local sales tax would be 2.75%, (iii) if the purchaser has a post office address of Excelsior Springs but receives delivery at his residence in Ray County outside the city limits of Excelsior Springs, the combined local sales tax rate would be 1.5 percent, and (iv) if the purchaser has a post office address of Excelsior Springs but receives deliveries at his residence in Clay County outside the city limits of Excelsior Springs, the combined local sales tax rate would be .75 percent. And another alternative could be that the purchaser was not at home when the delivery was attempted and the purchaser was then left a note to pick up the goods at the Post Office, the Federal Express office, the United Parcel Service office, the trucking company office, or other carrier involved. Query in what location each such office where a purchaser might take delivery is located. How can one reasonably expect a clerk for an out-of-state vendor to ascertain the proper rate and jurisdictions to report in such situations. And how can a clerk at the Missouri Department of Revenue be reasonably expected to ascertain and decipher the permutations of residence that might be involved. And for that matter, the point at which a purchaser taxpayer actually will take delivery cannot necessarily be predicted until the purchaser takes delivery.

When one multiplies the Excelsior Springs example by the statistical possibilities that might occur in determining the

tax rate on purchases because of the permutations resulting upon consideration of county local sales taxes, local municipal sales taxes, the vagarities of a postal address being within or without a particular county or municipality, and the vagarities of delivery of goods at different locations notwithstanding a projected delivery address, it becomes readily apparent that the determination of a proper local use tax to be applied would be a nightmare for all concerned.

4. The permutations of the varying situations involved in determining the proper local use tax due which are noted in the preceding paragraph do not, however, give consideration to the abuses which could readily occur in such system by taxpayers seeking to avoid the payment of use taxes. Since use taxes are normally imposed at the first place in the state where the taxpayer exercises the privilege of storing or consuming the tangible personal property, the "sophisticated" taxpayer with expert counsel would undoubtedly seek to "receive" the goods from out of state at a location where there are little or no local sales taxes – and hence, under this assumed situation, little or no use taxes would be paid. In such a situation, the temptation to take advantage of such tax "avoidance" device would, it is believed, be difficult for many "sophisticated" taxpayers to resist. The Constitution does not require Missouri to "build in" such a loop hole of tax avoidance.

Interstate Buses Corporation v. Blodgett, 276 U.S. 245 (1928), *Lane Construction Corporation v. Comptroller of the Treasury*, 178 A.2d 904 (Md. 1962), and *Don McCullagh, Inc. v. State*, 93 N.W.2d 252 (Mich. 1958), involved taxing schemes which were asserted to be violative of the Commerce Clause. In each case, the Court relying upon *General American* held that perfect equality was not required and rejected the Commerce Clause challenge. Other cases where courts have looked to the totality of a state taxing scheme and have rejected a Commerce Clause challenge even though the taxes on interstate and intrastate commerce were not in all instances equals but were on average equivalent, include *Consolidated Freightways v. Department of Revenue*, 477 N.W.2d 44 (Wis. 1991); *WKBH Television v. Wisconsin Department of Revenue*, 250 N.W.2d 290 (Wis. 1977); and *Department of Revenue v. Warren Petroleum Corporation*, 119 N.E.2d 215 (Ill. 1954).

Petitioners rely, as they did before the Missouri Supreme Court, upon *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978) and *American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio 1978). The Missouri Supreme Court in its opinion properly distinguished those cases. It is further noted that even though both *Phillips* and *American Modulars* were decided after the seminal decision in *Complete Auto Body*, neither decision considered or cited *Complete Auto Body* – let alone discussed the triumph of substance over formalism reflected in *Complete Auto Body*. Furthermore, the prime authority for *American Modulars* was *Freeman v. Hewitt, supra*, which was repudiated by this Court in the *Complete Auto Body* decision.

Other cases cited by Petitioners were properly distinguished by Judge Price of the Missouri Supreme Court, and we will therefore not lengthen this Brief to further discuss those cases.

The Commerce Clause assertions of the Petitioners are without merit and no writ of certiorari should issue.

IV. *GENERAL AMERICAN* REQUIRES THE RESULT REACHED BY THE MISSOURI SUPREME COURT AND IT SHOULD NOT BE OVERRULED.

In their second ground for asserting that this Court should grant a writ of certiorari, Petitioners assert that *General American* does not require the result reached by the Missouri Supreme Court, and then alternatively argue that if so, *General American* should be overruled. The assertion that *General American* does not require the result reached by the Missouri Supreme Court is a mere reargument of the first asserted ground by the Petitioners for granting the writ, which we have previously discussed.

General American has been viable and controlling case law for 67 years. Petitioners have not shown any proper reason why, after 67 years, *General American* should be overruled. *General American* has not heretofore been questioned in any opinion of this Court.

CONCLUSION

Because Petitioners have not demonstrated entitlement to relief and for the reasons hereinabove set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,

vs.

JANETTE M. LOHMAN, Director of Revenue, and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Missouri

BRIEF OF RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Petition For Writ Of Certiorari
To The Supreme Court of Missouri

BRIEF OF RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion (joined in by 6 of the 7 judges) of the Missouri Supreme Court and the Dissenting Opinion filed June 29, 1993, are reproduced as Appendix A to the Petition for Writ of Certiorari at A-1. The unreported Judgment of the Circuit Court

of Cole County dated July 15, 1992, is reproduced as Appendix B to the Petition for Writ of Certiorari at A-35.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Supreme Court was entered on June 29, 1993. Petitioners did not file a motion for rehearing as is authorized by Rule 84.17, Missouri Rules of Civil Procedure. Petitioners assert jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, the following provisions are noted:

CONSTITUTION OF MISSOURI, Article X, § 1:

> "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

CONSTITUTION OF MISSOURI, Article X, § 10(b):

> "Nothing in this constitution shall prevent the enactment of general laws directing the payment of funds collected for state purposes to counties or other political subdivisions as state aid for local purposes."

The Missouri General Assembly has authorized local governments (primarily counties and municipalities) in Missouri to impose multiple sales taxes on sales of tangible personal property sold within their jurisdictions. These are authorized, *inter alia*, by Sections 66.600 to 66.635, 67.500 to 67.545, 92.400 to 92.420, 94.500 to 94.519, 94.600 to 94.655, and 94.700 to 94.745, RSMo. There are no Missouri statutes which authorize local governments in Missouri to impose use taxes.

STATEMENT OF THE CASE

The Brief in Opposition to the Petition for Writ of Certiorari of Respondents Missouri Association of Counties, Missouri Municipal League, Delongs Incorporated, City of Blue Springs, Gary Markenson, and Associated General Contractors of Missouri (hereinafter referred to as "Respondents-Intervenors"), contains a thorough statement of the case and, therefore, is not repeated herein. For purposes of this brief, however, provided below is a description of the Missouri sales and use tax statutes.

The Missouri use tax rate equals 5.725% and is uniform among all counties and municipalities in Missouri. The use tax rate of 5.725% equals the sum of the use tax rate of 4% imposed by § 144.610, RSMo, the 1.5% rate imposed by § 144.748, RSMo, and the .225% rate imposed by §§ 43(a) and 47(a) of the Constitution of Missouri (1945, as amended). The use tax rate of 5.725% is hereinafter collectively referred to as the "uniform use tax rate."

The Missouri sales tax rate that is imposed on a statewide level equals 4.225%. Section 144.020, RSMo, and §§ 43(a) and 47(a) of the Missouri Constitution. County and municipal governments, however, are authorized, but not required to, impose additional sales tax on sales occurring within their jurisdiction. Therefore, depending upon the rate of additional sales tax imposed by each county and municipal government, the actual sales tax rate for sales occurring within a particular county or municipality may be higher than, equal to, or lower than the uniform use tax rate of 5.725%. With respect to any particular county or municipality, the sum of the sales tax rates imposed on the state level and the county/municipality level is hereinafter referred to as the "aggregate sales tax rate."

Following are percentages of the total dollar amount of taxable sales made in Missouri for calendar year 1990[1], in which the aggregate sales tax rate imposed would have been less than, greater than, or equal to the uniform Missouri use tax rate:

1. 6.86% of all taxable sales in Missouri occur in counties where the aggregate sales tax rate is less than the uniform use tax rate. These are the instances in which Petitioners object.

2. 55.32% of all taxable sales in Missouri occur in counties where the aggregate sales tax rate is greater than the uniform use tax rate. In these counties, the Missouri sales/use tax statutes have the effect of encouraging interstate sales over intrastate sales. Petitioners' argument ignores the importance of this effect.

3. 37.82% of all taxable sales in Missouri are made in counties where the sales and use tax rates are equal.[2]

Based on taxable sales made in Missouri during 1990, if Missouri had imposed a statewide uniform sales tax rate of 5.725% (*i.e.*, a rate equal to the uniform use tax rate) in place of the aggregate sales taxes imposed in the various Missouri counties and municipalities, approximately $100 million less in sales taxes would have been imposed.

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[1] In the lower courts, the parties stipulated to these figures that reflect taxable sales made in Missouri for calendar year 1990.

[2] As they did in the lower courts, Petitioners argue that the impact on interstate commerce in the instant case should not be based on percentages of the total Missouri sales market but rather on percentages based upon the number of Missouri counties or Missouri population. Contrary to Petitioners' assertion, the impact of a sales and use tax can only be measured by the dollar amount of sales since that is the basis for their imposition. To illustrate, if 100% of all Missouri sales and purchases occurred in locations where the sales and use tax rates were identical, no economic disparity or discrimination would in fact occur; and this is so regardless of population or number of counties.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS DID NOT EXHAUST THEIR RIGHTS OF REVIEW BEFORE THE MISSOURI SUPREME COURT

The Brief in Opposition to the Petition for Writ of Certiorari of Respondents-Intervenors contains a complete and thorough argument that this Court should not exercise its discretion to grant the Writ of Certiorari in this case on the basis that Petitioners, by not filing a motion for rehearing with the Missouri Supreme Court pursuant to Rule 84.17, Missouri Rules of Civil Procedure, did not exhaust their rights of review before the Missouri Supreme Court. Respondent Lohman joins with Respondents-Intervenors that the Writ of Certiorari should not be granted for this reason but in the interests of brevity, does not repeat the argument herein.

II. PETITIONERS DO NOT HAVE STANDING IN THIS COURT UPON THE RECORD IN THIS CASE TO CHALLENGE THE CONSTITUTIONALITY OF MISSOURI'S USE TAX LAW.

For the reasons stated in Respondents-Intervenors Brief in Opposition to the Petition for Writ of Certiorari, Respondent Lohman joins with Respondents-Intervenors that Petitioners do not have standing to challenge the constitutionality of Missouri's use tax law in this case. In the interests of brevity, the discussion contained in Respondents-Intervenors brief is not repeated herein.

III. MISSOURI'S SALES/USE TAX STATUTES, HAVING THE OVERALL EFFECT OF PROMOTING INTERSTATE COMMERCE, DOES NOT VIOLATE THE COMMERCE CLAUSE; *GENERAL AMERICAN* REQUIRES THE RESULT REACHED BY THE MISSOURI SUPREME COURT AND IT SHOULD NOT BE OVERRULED.

A. Petitioners' Argument Ignores The Overall Effect Of The Missouri Sales/Use Tax Statutes.

Petitioners contend that the additional use tax statute of § 144.748, RSMo, discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.[3] Such contention is premised on the fact that under the Missouri sales/use tax statutes, various Missouri counties have an aggregate sales tax rate which is lower than the uniform Missouri use tax rate.

Petitioners ignore and/or attempt to mitigate the importance of the fact that other counties of Missouri, including the state's most populous counties, have aggregate sales tax rates which exceed the uniform Missouri use tax rate. As an illustration of their position, Petitioners on page 10 of their Petition provide an example of an Illinois mail order house that sells computers to residents of Dexter or Kennett, Missouri. The example states that because the aggregate sales tax rate at such locales is less than the uniform Missouri use tax rate, the mail order house finds itself at a competitive disadvantage to the local Apple distributor. Petitioners argue that this alone invalidates the Missouri use tax even though the counties in which these instances occur represent only 6.86% of the Missouri sales market. Petitioners,

[3] For purposes of simplification and without changing substantive analysis, Petitioners' constitutional objection to the additional use tax statute of § 144.748, RSMo, is hereinafter referred to as an objection to the operation of Missouri's sales/use tax statutes as a whole.

however, failed to mention in their example that the same Illinois mail order house has a competitive advantage over local Apple distributors located in Missouri counties which represent 55.32% of the Missouri sales market and is on an equal footing in the remaining counties of Missouri.[4]

B. No Case Cited And Relied On By Petitioners Supports Their Argument That Each Instance Of Interstate Commerce Should Be Isolated Without Taking Into Account The Overall Effect Of The Missouri Sales/Use Tax Statutes.

Petitioners in effect argue that each and every instance of interstate commerce must be treated equally under Missouri's sales/use tax statutes and that the overall effect of the tax statutes is not the "pivotal issue." Their argument requiring isolation of specific instances of Missouri's sales/use tax statutes without taking into account its overall effect is not supported by any case in which they rely.

Petitioners place principal reliance on the following four decisions of this Court: *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64 (1963); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); and *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). Contrary to Petitioners' assertion, these cases do not hold that each transaction affected by complementary sales/use tax statutes is to be placed in a vacuum and isolated for purpose of Commerce Clause analysis. Equally as important, these cases do

[4] It is notable that Petitioners are companies located in Missouri and do not represent non-Missouri companies such as the Illinois mail order house. It is economically unlikely that a non-Missouri company such as the Illinois mail order house would object to the overall economic advantage that such companies have in counties which comprise 55.32% of Missouri's sales market with areas of economic disadvantage constituting only 6.86% of Missouri's sales market.

not conflict with this Court's opinion in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925) which requires analysis of the overall effect of complementary sales/use tax statutes to determine whether it discriminates against interstate commerce.

In *Halliburton*, the Louisiana use and sales tax rates were identical but applied to differing tax bases depending upon whether certain specialized oil production equipment was manufactured in Louisiana or another state. If the equipment was manufactured outside of Louisiana, the tax basis for application of the Louisiana use tax included labor and overhead costs incurred in the manufacturing process. If the equipment was manufactured in Louisiana, the tax basis did not include labor and overhead costs.[5] The Court found that the additional tax burden imposed on out-of-state operations impermissibly favored local manufacturing of the equipment in Louisiana and, therefore, held that the Louisiana use tax violated the Commerce Clause.

In *Maryland v. Louisiana*, a use tax was imposed on oil and gas piped into Louisiana from the Outer Continental Shelf (OCS). Exemptions from the use tax and certain credits against the tax[6] applied where the OCS gas was used in certain commercial operations located in Louisiana, *i.e.*, the production of oil, natural gas, or sulphur and manufacture of fertilizers. Non-Louisiana use of the OCS gas would bear the full burden of the use tax. The Court held that the use tax violated the Commerce

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[5] In *Halliburton*, the manufacturer was also the user of the equipment. If the equipment was manufactured in Louisiana, sales or use tax would be imposed on the materials used in manufacturing the equipment *i.e.*, sales tax for materials purchased within Louisiana and use tax for materials purchased outside Louisiana. The net effect, however, was that no tax would apply to non-material costs, *i.e.*, labor and overhead costs.

[6] Credits against the use tax were provided for severance tax paid by taxpayers engaged in the production of oil and gas in Louisiana.

Clause by impermissibly discriminating in favor of local interests through the various credits and exemptions.[7]

In *Bacchus*, Hawaii imposed a 20% excise tax on sales of liquor at wholesale. To stimulate and encourage liquor production in Hawaii, sales of certain brandy and pineapple wine manufactured in Hawaii were exempted from the excise tax. This Court found that the exemption from the excise tax for the locally produced brandy and pineapple wine had both a discriminatory purpose and discriminatory effect. The economic protectionism of the exemption was held to violate the Commerce Clause despite evidence that sales of the locally produced brandy and pineapple wine constituted less than 1% of the total liquor sales in Hawaii.[8]

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[7] In *Maryland v. Louisiana*, this Court, in concluding that further hearings were not required to determine the extent of the discrimination, stated that "[w]e need not know how unequal the tax is before concluding that it unconstitutionally discriminates." 451 U.S. at 759-760. Petitioners misinterpret this passage to mean that if any instance of interstate commerce is treated unequally under Missouri's sales/use tax statutes, the statutes unconstitutionally discriminate. The facts of the case do not support this interpretation. The Court by such passage was merely recognizing that the exemptions and credits operated in a discriminatory manner in each and every instance that they applied and, therefore, could have nothing but a discriminatory effect. In such case, the actual dollar amount or extent of discrimination is immaterial. In the instant case, and contrary to *Maryland v. Louisiana*, the evidence shows that the Missouri sales/use tax statutes produce instances in which interstate commerce is burdened *less* than intrastate commerce and as a whole, promotes interstate commerce over intrastate commerce.

[8] Petitioners, on Page 11 of their Petition, emphasized that this Court in *Bacchus* rejected a "de minimis" argument based on a substantially smaller percentage of overall sales volume (less than 1%) than is present here (6.86%). Again, Petitioners argue the case out of context. In *Bacchus*, like the situation in *Maryland v. Louisiana*, the exemption operated in a discriminatory manner in each and every instance it applied. Since only discrimination could occur by application of the exemption, this Court, citing *Maryland v. Louisiana*, did not entertain an argument as to how unequal the tax is before

(Footnote 8 continued on next page)

In *Armco*, a gross receipts tax was imposed on all sales of tangible property at wholesale except goods sold at wholesale which were manufactured by local manufacturers. The local manufacturer, however, was subject to a manufacturing tax which exceeded the gross receipts tax. In assessing whether the gross receipts tax discriminated against interstate commerce, this Court held that the gross receipts tax and the manufacturing tax were not complementary taxes since manufacturing and wholesaling were not substantially equivalent events. Because the manufacturing tax was not considered in determining whether discrimination existed, this Court held that the exemption from the gross receipts tax for local manufacturers violated the Commerce Clause.

The critical factual distinction between the present case and *Halliburton*, *Maryland v. Louisiana*, *Bacchus*, and *Armco* is that in each of these cases the particular aspect of the sales or use tax under examination operated in a discriminatory manner each and every instance in which it applied. In *Halliburton*, because of the differing tax bases of the specialized equipment, the Louisiana use tax operated in a discriminatory manner each and every time the equipment was manufactured outside of Louisiana. In *Maryland v. Louisiana*, the exemptions and credits provided with respect to imposition of Louisiana's use tax had a discriminatory effect each and every time the OCS gas was not used for production of oil, natural gas, sulphur, or fertilizers within the state of Louisiana. In *Bacchus*, the exemption from the excise tax for brandy and pineapple wine manufactured in Hawaii discriminated against all other liquors sold in the state each and every

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(Footnote 8 continued)

concluding that it unconstitutionally discriminated. 468 U.S. at 269. Comparison of the percentage of sales volume in *Bacchus* and the present case is inappropriate since the Missouri sales/use tax statutes favor interstate commerce both in individual instances and as a whole.

time the brandy or pineapple wine was purchased. Finally, in *Armco*, the exemption from the gross receipts tax operated in a discriminatory manner in favor of local manufacturers each and every time such manufacturers sold their manufactured goods at wholesale.

The cases relied on by Petitioners did not present the current situation where complementary sales/use tax statutes operate in a manner which not only produce instances in which interstate commerce is burdened less than intrastate commerce, but favor interstate commerce overall. The Missouri Supreme Court found these distinctions to be controlling. As it stated on page A-16 of its Opinion, the discriminatory effect in the cases relied on by Petitioners occurred "both on an individual basis and on an average statewide basis" and "[i]n no such case was the use tax ever less than the sales tax."

Other cases in which Petitioners rely were likewise distinguished by the Missouri Supreme Court for the same reasons. The decisions in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978); and *American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio 1978) all involve situations where the sales/use tax statutes can only have the effect of discriminating against interstate commerce.

C. *General American* Requires The Result Reached By The Missouri Supreme Court.

The Missouri Supreme Court in its opinion held that the overall effect of the Missouri sales/use tax statutes was the determining factor in the instant case and not the individual instances where inequality existed. This holding is supported

and required by this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925).[9]

In *General American*, nonresident railroad companies were assessed a Louisiana state tax equal to 25 mills per dollar of rolling stock used in the state. Each of the several parishes of Louisiana and the municipalities in the parishes assessed a local tax which applied to rolling stock of railroad companies domiciled in that particular parish. The rate of local tax varied among the parishes and municipalities with rates at below and above 25 mills per dollar of rolling stock. However, it was found by the lower state courts that the average rate of local tax imposed by the various parishes and municipalities was 25 mills. Nonresident railroad companies, although subject to the 25 mill flat tax imposed on the state level, were exempt from the local taxes imposed by the parishes and municipalities.

The taxpayer in *General American* argued that the state tax discriminated against nonresident railroad companies in violation of the Commerce Clause and the Equal Protection Clause of the U.S. Constitution. Upon analyzing the complementary nature of the tax imposed on the state and local levels, the Court held that the overall taxing scheme did not violate either the Commerce Clause or the Equal Protection Clause. In so holding, the Court stated:

---

[9] Petitioners claim that the Missouri Supreme Court's reliance on *General American* is misplaced since it is not a sales/use tax case and the portion of the opinion relied upon deals only with the Equal Protection Clause. Petitioners, however, provide no reason why the Court's rationale in *General American* with respect to the complementary state and local excise taxes are not equally applicable to complementary sales and use taxes. In addition, the opinion in *General American* does not formally separate the Commerce Clause and Equal Protection issues, but rather applies its analysis of weighing the effect of the state and local excise taxes for both issues.

> There being no question as to the amount of the tax or the method of its computation, the taxation of appellant's property within the state can be open to no objection, unless it operates to discriminate in some substantial way between the property of the appellants and the property of residents or domiciled nonresidents.
>
> * * *
>
> We are not concerned with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions. That is a matter within the competency of the state legislature.
>
> * * *
>
> The court below found . . . that all local taxes throughout the state, from which the appellants are exempted by the Louisiana constitution, average approximately 25 mills and since the tax assessed [on the state level] was substantially the equivalent of the local tax in lieu of which it was assessed, there was no unjust discrimination.
>
> * * *
>
> Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. 270 U.S. 372-373.

This Court's decision in *General American* clearly establishes that in assessing the constitutionality of complementary sales/use tax statutes in which all instances of taxation are not equal, the overall effect of the statutes is the proper point of analysis. The principal enunciated in *General American* has been relied on by other state courts in upholding use taxes where specific

instances of inequality existed but where the overall scheme was deemed fair. *Lane Construction Corp. v. Comptroller of the Treasury*, 178 A.2d 904 (Md. 1962); *Don McCullagh, Inc. v. State*, 93 N.W.2d 252 (Mich. 1958); *Consolidated Freightways v. Department of Revenue*, 447 N.W.2d 44 (Wis. 1991); *WKBH Television v. Wisconsin Department of Revenue*, 250 N.W.2d 290 (Wis. 1977); and *Department of Revenue v. Warren Petroleum Corporation*, 119 N.E.2d 215 (Ill. 1954). Petitioners' argument for isolation of specific instances of Missouri's complementary sales/use tax statutes instead of analyzing its overall effect is contrary to the mandate of *General American*.

The Missouri Supreme Court in its opinion, relying on *General American* and *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), correctly upheld the Missouri use tax by weighing the relative advantage and disadvantage that interstate commerce has in the Missouri sales market. In summary, the Missouri Supreme Court stated as follows:

> The use tax enacted by § 144.748 was calculated to produce a statewide result of a lesser burden on interstate commerce than exists for intrastate commerce. The stipulated facts indicate that for 1990, the use tax at issue would have resulted in approximately $100,000,000 less in overall tax liability than the corresponding sales taxes. When combined with the fact that 93.14% of the 1990 sales would have resulted in use taxes either at the same or at lower rates than the complementary sales tax, it is apparent that the tax was designed, and apparently works, to avoid discrimination on a statewide basis.
>
> * * *
>
> Under a "practical analysis" or "practical effect" test, § 144.748 passes scrutiny. In a state where a permissive system of local sales tax is allowed, the adoption of a statewide complementary use tax that results in a dollar for

> dollar match is most likely impossible. The Missouri legislature appears to have prudently set the use tax rate established by § 144.748 at a level that taxes most transactions at a lower rate than the sales tax rate. On a statewide basis "interstate commerce," as such, is not discriminated against. While in certain localities the use tax may exceed the sales tax and while individual purchasers may choose [sic] to take advantage of these discrepancies on occasion, we must recall that while the Commerce Clause portects "interstate commerce," it does not require identical treatment of all taxpayers. In short, we do not find that appellants have established a discrimination that produces the type of "real injury" required by *Gregg Dyeing Co.* to invalidate a tax. Missouri Supreme Court Opinion at A-17 and A-18.

D. *General American* Is Not Inconsistent With *Halliburton, Maryland v. Louisiana, Bacchus*, And *Armco* And, Therefore, Should Not Be Overruled.

In their second ground for granting the writ of certiorari and as their second issue presented in this case, Petitioners argue that *General American*, to the extent it requires the result reached by the Missouri Supreme Court, is inconsistent with the decisions in *Halliburton, Maryland v. Louisiana, Bacchus*, and *Armco* and, therefore, should be overruled. As discussed previously, the latter cases cited and relied upon by Petitioners did not involve complementary sales and use tax statutes which favored interstate commerce in specific instances and overall. The Missouri Supreme Court correctly found that these cases are factually distinguishable from *General American* and, therefore, are not controlling. The decision in *General American* is factually on point and controlling in this case. Petitioners have simply failed to show any compelling reason to overrule *General American*.

CONCLUSION

Because of the reasons stated above, Petitioners have failed to show that they are entitled to relief and therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue
and
DELONGS, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Missouri

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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INTRODUCTION

Both sets of respondents acknowledge that the Questions Presented by our petition are indeed squarely posed by this case. Both sets of respondents also defend the Missouri Supreme

Court's analysis of this case and its reliance on *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925), to justify and legitimize the substantial discrimination against interstate commerce inherent in the Missouri use tax.

Both sets of respondents, however, seek to avoid review of the constitutional issue in this case by suggesting procedural and jurisdictional impediments to the Court's consideration of the merits. This reply is filed for the limited purpose of refuting respondents' spurious suggestions that this case is not properly here.

I. THE FILING OF A MOTION FOR REHEARING BEFORE THE MISSOURI SUPREME COURT IS NOT A CONDITION PRECEDENT TO A "FINAL" JUDGMENT UNDER 28 U.S.C. § 1257(a).

Respondents argue that petitioners did not exhaust the judicial resources of the State of Missouri because they did not file a motion for rehearing, as permitted (but not required) by Rule 84.17 of the Missouri Rules of Civil Procedure. This case was heard by the state Supreme Court en banc, and it is well settled that a petitioner in this Court is not first required to request rehearing when the highest court of the state has ruled. In STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986), p. 138, the authors confirm the seemingly self-evident proposition that ". . . where no petition for rehearing is in fact filed, the mere existence of state procedure permitting such a filing does not affect the finality of the judgment and does not prevent the Supreme Court from asserting immediate jurisdiction over the case. *Southern R. Co. v. Clift*, 260 U.S. 316 (1922); *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551-52 (1945)."

Respondents' "exhaustion" argument is frivolous.[1]

II. PETITIONERS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF § 144.748, R.S.Mo. (Supp. 1991).

The parties stipulated that the state trial court had jurisdiction to hear this case (Stip. ¶1). The state respondents did not question petitioners' standing either in the trial court or in the state Supreme Court. The intervenor-respondents raised standing as an issue, but the Missouri Supreme Court summarily rejected that argument (Pet. Apdx. A-2-3).

In an effort to avoid review in this Court, both sets of respondents have now questioned petitioners' standing (although the state respondents have done so almost entirely by incorporating the intervenors' arguments), and both have distorted the record and misapprehended the law.

The stipulation of the parties establishes the following facts relating to standing:

1. Although all the members of Petitioner Associated Industries of Missouri ("AIM") do business in Missouri, some of them "are multi-state corporations whose principal operations and headquarters are located outside Missouri" (Stip. ¶2). The members pay sales *and use taxes*, when applicable, on purchases of tangible personal property made within and without Missouri (Stip. ¶4). AIM itself, of course, has standing to bring suit on

---

[1] In *Osment v. Pitcarin*, 317 U.S. 587 (1942), the petitioner was seeking review of a decision of *a division* of the Missouri Supreme Court, and he had not petitioned for rehearing by the court en banc before coming here. This Court held that the petitioner had not exhausted the appellate review provided by state law, and jurisdiction in this Court was lacking. The Missouri Supreme Court no longer sits in divisions; as noted, this case was heard originally by the court en banc.

behalf of its members who would otherwise have standing to sue in their own right. *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333, 341-45 (1977); *Warth v. Seldin,* 422 U.S. 490, 511 (1975).

2. Several members of AIM also collect and remit Missouri use taxes on sales of personal property made by them outside of Missouri to purchasers located within Missouri (Stip. ¶4). When those companies sell goods into Missouri, they are required to collect the 1.5% additional use tax that is challenged in this case.[2]

3. Petitioner Alumax buys property from sellers within and without Missouri and pays sales and use taxes, respectively, on such purchases. Alumax pays approximately $3,000 in Missouri use taxes each month, more than one-quarter of which is attributable to the offending 1.5% additional tax imposed by §144.748 (Stip. ¶5).

4. Alumax purchases products from a vendor located in St. Francois County, Missouri, which are subject to a sales tax of 4.975% — less than the use tax applicable statewide (Stip. ¶5).

Respondents apparently assume that only an out-of-state merchant who sells goods into a Missouri county where the use tax is higher than the sales tax would have standing to complain of unconstitutional discrimination. Even if that were correct, petitioners would plainly qualify because, as noted above, they are required to collect use taxes on sales of personal property made by them outside of Missouri to purchasers inside Missouri — including those parts of Missouri where the use tax exceeds the sales tax.

But the universe of injured parties is not so narrowly circumscribed. The 1.5% additional use tax is imposed by state statute (§ 144.748) and is applicable in every city and county to every interstate sales transaction. So anyone who is required to collect use taxes — as well as anyone who is required to pay them — is injured because the discriminatory feature of the additional use tax renders it invalid on its face in all its applications. Stated otherwise, the unconstitutional aspect of the tax prevents its collection anywhere in Missouri. Therefore, anyone who has paid a use tax under the present statutory scheme — a group that plainly includes petitioners — has necessarily paid the offending 1.5% component thereof and has standing to assert its unconstitutionality.

[2] Hence, respondent Lohman's conclusion in footnote 4 (Br. 7) is simply wrong. Some petitioners are in fact identically situated to the Illinois mail-order house hypothesized at page 10 of our petition.

* * * * *

Accordingly, the procedural roadblocks created by respondents are illusory and do not prevent the Court's consideration of the substantial constitutional issues presented by this case.

Respectfully submitted,

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Supreme Court, U.S.

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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,

vs.

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GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

JOINT APPENDIX

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The following opinions and judgments have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

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CIRCUIT COURT OF COLE COUNTY

Case No.: CV192-0015CC

Relevant Docket Entries

01/06/92	Petition for Declaratory Judgment and Injunction
02/07/92	Defendant's Answer
05/18/92	DeLong's Inc. et al Motion to Intervene (w/Answer of Intervenor-Defendants attached)
05/22/92	Plaintiffs' Motion For Summary Judgment and Suggestions in Support Thereof
05/22/92	Plaintiffs' Notice of Hearing on Motion For Summary Judgment
05/22/92	Affidavits of Kenneth D. Ramsey and Curtis M. Long
06/03/92	Plaintiffs' Suggestions in Opposition to Motion to Intervene
06/04/92	DeLong's, Inc., et al's First Amended Motion to Intervene
06/05/92	Affidavit of Ed Robb
06/05/92	Affidavit of William Johnson
06/05/92	Affidavit of F. Joe DeLong
06/12/92	Defendant's Suggestions in Opposition to Plaintiffs' Motion For Summary Judgment
06/18/92	Affidavit of Raymond L. Hanley
06/19/92	Reply to Defendant's Suggestions in Opposition to Plaintiffs Motion for Summary Judgment

06/19/92	Depositions of Beth Harris; Edward Robb, Ph.D.; and Raymond McCarty taken on behalf of Plaintiffs
06/23/92	First Amended Motion to Intervene of DeLong, Inc., et al. sustained.
	First Amemded Answer deemed filed; Plaintiffs' Motion for Summary Judgment taken with the case
07/15/92	Plaintiffs' Motion for Summary Judgment overruled: provisions of Section 144.748 do not violate provisions of Section 9 of the 14th amendment, nor the provisions of Section 2 or 10 or Article I or X or IV of the Mo. Constitution. Plaintiffs denied relief on petition, both declaratory and injunctive. Costs taxed to plaintiffs. (c/Judgment)
08/04/92	Plaintiff's Notice of Appeal to the Supreme Court of Mo.

SUPREME COURT OF MISSOURI

Case No. 75089

Relevant Docket Entries

08-04-92	APPEAL FILED IN CIRCUIT COURT
08-05-92	APPEAL FILED IN SUPREME COURT OF MISSOURI
08-05-92	NOTICE OF APPEAL FILED WITH JURISDICTIONAL STATEMENT W/SER. (FILED IN CIRCUIT COURT: AUGUST 4, 1992.)
10-26-92	RECORD ON APPEAL TRANSFERRED BY JUAN D. KELLER
	(RECORD: 2 VOLS. LEGAL FILES, 1 VOL. TRANSCRIPT.)
10-27-92	SUPPL. LEGAL FILE FILED BY LV. OF CT. (1 VOL.) RECORD COMPLETE
11-04-92	APPELLANTS BRIEF BY JUAN D. KELLER
12-04-92	CASE DOCKETED FOR 02-03-93
12-22-92	RESPONDENTS BRIEF BY CURTIS FRANK THOMPSON
01-07-93	INTVS.-RESPS.' (DELONG'S INC., ET AL.) BRIEF FILED.
01-26-93	APPELLANT'S REPLY BRIEF BY JUAN D. KELLER
02-03-93	ARGUED AND SUBMITTED
02-03-93	BENTON, J., NOT SITTING; AHRENS, SP. J., SITTING.

06-29-93	AFFIRMED SIGNED MAJORITY OPINION BY WILLIAM RAY PRICE JR.
06-29-93	CO,HO,TH,LI,JJ., & AHRENS, SP.J, CONCUR; RO, C.J, DISSENTS IN SEP
06-29-93	OPINION FILED.
07-15-93	MANDATE SENT

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

Cause No. CV 192-15CC

ASSOCIATED INDUSTRIES OF MISSOURI and
ALUMAX FOILS, INC.,
Plaintiffs,

v.

RAYMOND T. WAGNER, JR.,
DIRECTOR OF REVENUE, STATE OF MISSOURI,
Defendant.

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION

[Filed: Jan. 6, 1992]

COMES NOW Plaintiffs, Associated Industries of Missouri ("AIM") and Alumax Foils, Inc. ("Alumax"), and for their Petition for declaratory judgment and injunction state as follows:

COUNT I

(Declaratory Judgment)

1. Jurisdiction of this Count [*sic*] is founded upon §§527.010 and 527.020, RSMo. (1986) (as amended), and venue is in this Court under §508.010(1).[1]

2. Plaintiff AIM is a Missouri not-for-profit corporation which operates as a "business league" within the meaning of §501(c)(6) of the Internal Revenue Code of 1986, the membership of which consists of persons, firms, partnerships, and corporations engaged in business or industry in Missouri. Sev-

---

[1] All citations herein are to the Missouri Revised Statutes of 1986, as amended, unless otherwise indicated.

eral of AIM's members are multistate corporations whose principal operations and headquarters are located outside Missouri. AIM's principal purpose is to promote a business-oriented philosophy and to represent the interests of its members in the Missouri General Assembly and agencies and instrumentalities of the State. AIM was organized to secure cooperation among the industrial and commercial interests in the State of Missouri in all matters national and local affecting their welfare and the welfare of the people of Missouri. AIM's members pay Missouri sales and use taxes, as applicable, on purchases of tangible personal property made within and without this State. Several of AIM's members also collect and remit Missouri use tax on sales of tangible personal property made outside Missouri to purchasers located within this State. AIM brings this action on behalf of and as representative for its members who have standing to bring this suit in their own right.

3. Plaintiff Alumax is a Delaware corporation with its corporate headquarters at 6100 South Broadway, St. Louis, Missouri 63111. Alumax is engaged primarily in the business of manufacturing and selling foil products both within and without Missouri. In connection with its business operations, Alumax purchases tangible personal property from vendors located both within and without Missouri and pays Missouri sales and use taxes, as applicable, on such purchases. Currently Alumax pays approximately $3,000 per month in Missouri use taxes. Alumax is a member of AIM and is authorized to do business in the State of Missouri.

4. Defendant Raymond T. Wagner, Jr. is the duly appointed and qualified Director of Revenue of Missouri within the meaning of Art. IV, §22 of the Missouri Constitution. This action is brought against Defendant in his official capacity and not individually.

5. S.C.S.H.C.S.H.B. 25 (hereinafter "H.B. 25"), enacted by the General Assembly and signed by the Governor in 1991, *inter*

alia, amended §144.747, RSMo. Supp. 1990, to impose a new and additional use tax ("local use tax") of one and one-half percent (1-1/2%) on all transactions subject to tax under §§144.600 to 144.745, RSMo. ("state use tax"). Voter approval of the local use tax was not required. Section C of H.B. 25 requires (1) AIM's members and Alumax to collect or pay, as appropriate, and (2) Defendant to collect, the local use tax effective July 1, 1992, as an additional tax on all transactions subject to the state use tax.

6. Defendant must perform all functions incident to the administration, collection, enforcement and operation of the local use tax. The said local use tax collected, less one percent, plus earnings thereon is required to be deposited in a "Local Use Tax Fund" and paid therefrom by Defendant, without appropriation by the General Assembly, to political subdivisions based on formulae set out in §144.747.3 - .10.

7. Certain Missouri cities and counties do not impose local sales tax. Accordingly, as of July 1, 1992, the local use tax, combined with the use tax imposed by §§144.600 to 144.745, will be imposed at a greater rate and will be greater in amount on sales in these cities and counties by or to AIM's members or Alumax subject to said taxes than will be the state and local sales taxes imposed pursuant to §§144.010 to 144.510 ("state sales tax"), 66.600 to 66.635, 67.500 to 67.545, 92.400 to 92.420, 94.500 to 94.570, 94.600 to 94.655, and 94.700 to 94.745 ("local sales taxes") on sales made in cities and counties in Missouri which impose no local sales taxes or which impose local sales taxes at rates less than 1-1/2%. Some examples of locales that impose local sales taxes at rates less than 1-1/2% are Dexter in Stoddard County; Nevada in Vernon County; Clifton Hill in Randolph County; New Cambria in Macon County; Napoleon in Lafayette County; Bixby and Glover, both in Iron County; Brandsville in Howell County; Stanberry in Gentry County; Kennett and Malden, both in Dunklin County; Winston in Daviess County; Gordonville in Cape Girardeau County; Murray

in Callaway County; Fort Worth, Monett and Springdale in Barry County; and Farber in Audrain County.

8. Accordingly, compliance with H.B. 25 will impose significant economic costs upon AIM's members and Alumax, which such costs will consist, *inter alia*, of the payment of the tax and the administrative costs of compliance. In addition, AIM's members who purchase items outside Missouri for storage, use or consumption in Missouri, or who sell items outside Missouri for purchasers' storage, use or consumption in Missouri, and Alumax will be competitively disadvantaged in relation to companies that purchase items in Missouri counties and cities that have no local sales tax or local sales taxes at rates less than 1-1/2%. The local use tax will discourage the flow of out-of-state goods into Missouri, thereby raising the cost to AIM's members and Alumax of doing business in Missouri.

9. The actions of the State of Missouri in imposing state and local use taxes at a combined rate of 5.725% when the state sales taxes on certain other identical sales in Missouri will be at rates from 4.225% to 5.725% are unlawful and violate the Equal Protection, Due Process and Uniformity Clauses of the Missouri Constitution, Art. I, §§2 and 10, and Art. X, §3, respectively, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, and the Interstate Commerce Clause of Article I, §8 of the United States Constitution, and the rights of AIM's members and Alumax thereunder.

10. The actions of the State of Missouri in imposing and distributing the local use tax as required by H.B. 25 are unlawful and violate Art. X, §§1 and 10(a) of the Missouri Constitution, and the rights of AIM's members and Alumax thereunder.

11. The actions of the State of Missouri in imposing and distributing the local use tax as required by H.B. 25 without the enactment of appropriations legislation violate Art. IV, §28 of the Missouri Constitution, and the rights of AIM's members and Alumax thereunder.

12. The actions of the State of Missouri in imposing and distributing the local use tax as required by H.B. 25 are unlawful and void and violate Art. X, §§16 and 22 of the Missouri Constitution, and the rights of AIM's members and Alumax thereunder.

13. AIM's members and Alumax will suffer injury and irreparable harm if the local use tax is imposed by the State and collected and distributed by Defendant in the manner set forth in H.B. 25.

14. A justiciable controversy exists between AIM and Alumax and Defendant as to the validity of the local use tax imposed by H.B. 25.

WHEREFORE, Plaintiffs pray that this Court:

A. Declare that H.B. 25 violates the Equal Protection, Due Process and Uniformity Clauses of the Missouri Constitution, Art. I, §§2 and 10, and Art. X, §3, respectively, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, and the Interstate Commerce Clause, Art. I, §8 of the United States Constitution, and the rights of AIM's members and Alumax thereunder.

B. Declare that H.B. 25 violates Art. X, §§1 and 10(a) of the Missouri Constitution, and the rights of AIM's members and Alumax thereunder.

C. Declare that H.B. 25 violates Art. IV, §28 of the Missouri Constitution, and the rights of AIM's members and Alumax thereunder.

D. Declare that H.B. 25 violates Art. X, §§16 and 22 of the Missouri Constitution, and the rights of AIM's members and Alumax thereunder.

E. Award Plaintiffs their reasonable attorney's fees and costs as provided in Art. X, §23 of the Missouri Constitution.

F. Grant such further relief as the Court deems just and proper.

COUNT II

(Injunction)

15. Jurisdiction of this Count is founded on §526.010 and venue is in this Court under §526.090.

16. Plaintiffs reallege and incorporate by reference paragraphs 2 through 14 of Count I as if fully set forth herein.

17. Unless Defendant is enjoined from collecting the use tax imposed by H.B. 25, AIM's members and Alumax will suffer irreparable injury and will have no full, adequate and complete remedy at law.

18. If AIM's members or Alumax refuse to collect or to pay the use tax imposed by H.B. 25, on information and belief, AIM and Alumax state that AIM's members and Alumax would be subject to audit by the Department of Revenue which by law would be required to assess such tax. AIM's members and Alumax would then be subject to liability for significant penalties and interest.

19. If, in the alternative, AIM's members and Alumax collected and paid the use tax imposed by H.B. 25, they would subsequently have to file refund claims for such taxes in order to contest the validity of the tax. No provision of Missouri law, however, allows AIM's members or Alumax to recover their costs in complying with the law or challenging the law.

WHEREFORE, Plaintiffs pray that this Court:

A. Issue an injunction prohibiting Defendant from enforcing the local use tax provisions of H.B. 25.

B. Grant such other relief as this Court may deem just and proper.

Respectfully submitted,

BRYAN, CAVE, McPHEETERS & McROBERTS

By: /s/ Juan D. Keller
Juan D. Keller, #19864

By: /s/ Brenda L. Talent
Brenda L. Talent, #35568

500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

Counsel for Plaintiffs

IN THE
CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

[Caption omitted in printing]

ANSWER

[Filed: Feb. 07, 1992]

Comes now the defendant, Raymond T. Wagner, Jr., Director of Revenue of the State of Missouri, and for his answer to plaintiffs' Petition for Declaratory Judgment and Injunction states as follows:

Count I

1. Defendant admits that venue is in this court under § 508.010, RSMo. Defendant admits that if plaintiffs have standing to sue and if they have alleged a cause of action for declaratory judgment, then jurisdiction would be properly founded upon §§ 527.010 and 527.020, RSMo.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of plaintiffs' petition, and therefore denies the same.

3. In response to Paragraph 3 of plaintiffs' petition, defendant admits that Alumax Foils, Inc., a foreign corporation, has paid Missouri sales tax and Missouri use tax, and has in the past paid $3,000.00 or more per month of Missouri use tax. Defendant is without knowledge or information sufficient to form a belief as to each and every other allegation contained in Paragraph 3 and therefore denies the same.

4. Defendant admits the allegations contained in Paragraph 4 of plaintiffs' petition.

5. In response to Paragraph 5 of plaintiffs' petition, defendant states that H.B. 25, now § 144.748, RSMo Supp. 1991, effective

July 2, 1992, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation that said law requires the members of Associated Industries of Missouri and Alumax Foils, Inc., to collect or pay tax.

6. In response to Paragraph 6 of plaintiffs' petition, defendant states that H.B. 25, now § 144.748, RSMo Supp. 1991, effective July 2, 1992, speaks for itself.

7. In response to Paragraph 7 of plaintiffs' petition, defendant admits that: (1) certain Missouri cities and counties do not impose local sales tax, (2) that the following locales impose local sales tax at rates less than 1 1/2 percent: Dexter in Stoddard County; Clifton Hill in Randolph County; New Cambria in Macon County; Napoleon in Lafayette County; Bixby and Glover, both in Iron County; Brandsville in Howell County; Stanberry in Gentry County; Kennett and Malden, both in Dunklin County; Winston in Daviess County; Gordonville in Cape Girardeau County; Monett in Barry County; and Farber in Audrain County. Defendant denies each and every other allegation contained in Paragraph 7 of plaintiffs' petition.

8. In response to Paragraph 8 of plaintiffs' petition, defendant states that he is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation that compliance with H.B. 25 will impose significant economic costs on the plaintiffs, and therefore, defendant denies the same. Defendant denies each and every other allegation contained in Paragraph 8 of plaintiffs' petition.

9 Defendant denies each and every allegation contained in Paragraph 9 of plaintiffs' petition.

10. Defendant denies each and every allegation contained in Paragraph 10 of plaintiffs' petition.

11. Defendant denies each and every allegation contained in Paragraph 11 of plaintiffs' petition.

12. Defendant denies each and every allegation contained in Paragraph 12 of plaintiffs' petition.

13. Defendant denies each and every allegation contained in Paragraph 13 of plaintiffs' petition.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of plaintiffs' petition, and therefore denies the same.

15. Defendant denies each and every allegation contained in Count I of plaintiff's petition, not specifically admitted herein.

WHEREFORE, defendant prays that this court deny plaintiffs' request for declaratory relief, declare that H.B. 25 does not violate the constitutional provisions enumerated in plaintiffs' petition, assess all costs herein against the plaintiffs, deny plaintiffs' request for attorney's fees, and grant such other relief as may be proper.

Count II

16. In response to Paragraph 15 of plaintiffs' petition, defendant admits that if plaintiffs have alleged a cause of action for an injunction, then jurisdiction and venue would be properly founded upon §§ 526.010 and 526.090, RSMo.

17. In response to Paragraph 16 of plaintiffs' petition, defendant incorporates his answer to Paragraphs 2 through 14 of Count I of plaintiffs' petition as if fully set forth herein.

18. Defendant denies each and every allegation contained in Paragraph 17 of plaintiffs' petition.

19. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in

Paragraph 18 of plaintiffs' petition and therefore denies the same.

20. Defendant denies each and every allegation contained in Paragraph 19 of plaintiffs' petition.

21. Defendant denies each and every allegation contained in Count II of plaintiff's petition, not specifically admitted herein.

22. Further answering, defendant states that plaintiffs have failed to state a claim for which injunctive relief can be granted.

WHEREFORE, defendant prays that this court deny plaintiffs' request for injunctive relief, assess all costs against the plaintiffs, and grant such other relief as may be proper.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

/s/ Carole Lewis Iles
CAROLE LEWIS ILES
Assistant Attorney General
Missouri Bar No. 33821

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(314) 751-8826

ATTORNEYS FOR RESPONDENT

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF COLE COUNTY, MISSOURI

[Caption omitted in printing]

FIRST AMENDED MOTION TO INTERVENE

[Filed: June 04, 1992]

Comes now DeLong's, Incorporated, the City of Blue Springs, Gary Markenson, the Missouri Association of Counties, the Missouri Municipal League, and the Associated General Contractors of Missouri, by their attorneys, and state to the Court as follows:

1. DeLong's, Incorporated ("DeLong's"), is a Missouri corporation with its principal place of business in Jefferson City, Cole County, Missouri. DeLong's is engaged in the steel business in Jefferson City, and sells its steel products in Missouri and also out of state. DeLong's is a Missouri taxpayer and pays state and local taxes. DeLong's collects state and local sales taxes upon its products which it sells within Missouri. The business in which DeLong's is engaged is a highly competitive business, and it is at a competitive disadvantage when out of state steel manufacturers sell their products in Missouri without the necessity of having to collect or pay local use taxes or a substitute therefore. DeLong's therefore has an interest in the issues raised in this litigation and seeks to intervene in this action because its burdens as a taxpayer will be more and because of the competitive disadvantage that it would be at if the Plaintiffs are successful.

2. The City of Blue Springs ("Blue Springs") is a municipality located in Jackson County, Missouri. Local sales taxes have been adopted by the City of Blue Springs pursuant to authorization by state law with respect to sales occurring within Blue Springs. Upon H.B. 25 becoming effective Blue Springs will receive substantial tax funds from the use tax for local purposes

provided for in H.B. 25. If the Plaintiffs are successful with their Petition, Blue Springs will therefore lose tax revenues and accordingly be harmed and damaged.

3. Gary Markenson ("Markenson") is a citizen and resident of Jefferson City, Cole County, Missouri. He is also a payer of sales taxes and other taxes to the City of Jefferson, the County of Cole and the State of Missouri. If the plaintiffs are successful with respect to their Petition, less tax revenues will be paid to the City of Jefferson and to the County of Cole with the consequent result that as a taxpaying citizen and resident in those jurisdictions he will have to pay a greater amount of taxes if said jurisdictions are to provide the same level of services and consequently he will be harmed and damaged. Markenson makes purchases in Jefferson City which are subject to sales tax in Missouri. If Plaintiffs are successful with their Petition, those purchases made by him in intrastate commerce within Jefferson City will be subjected to greater tax burdens than purchases made by others in interstate commerce coming into Jefferson City and he will be consequently harmed and damaged.

4. The Missouri Association of Counties (the "Association of Counties") is a Missouri not-for-profit corporation which is an association representing the interests of the counties of this state. Its members consists of Missouri counties. The Association of Counties seeks to intervene in this action on behalf of and as representative for its member counties who have standing to intervene in this case in their own right. The counties which the Missouri Association of Counties represent would lose tax revenues if the Plaintiffs would be successful with their Petition and be accordingly harmed and damaged.

5. The Missouri Municipal League (the "Municipal League") is a benevolent corporation formed pursuant to the laws of the state of Missouri. Its members are Missouri municipalities. The Municipal League seeks to intervene in this action on behalf of and as representative for its member municipalities who have

standing to intervene in this action in their own right. If the Plaintiffs are successful with their Petition, the member municipalities of the Municipal League will lose tax revenues and be accordingly harmed and damaged.

6. The Associated General Contractors of Missouri ("AGC") is a benevolent corporation formed pursuant to the laws of the state of Missouri. The AGC was organized to secure cooperation among contractors and other similar business interests in the state of Missouri in matters affecting their welfare and the welfare of the people of Missouri. The members of the AGC pay Missouri state and local taxes in Missouri, including sales and use taxes, as applicable, on purchases of tangible personal property made within and without the state. Several of the members of the AGC also collect and remit state and local sales taxes on sales of tangible personal property made in Missouri to purchasers located within the state. With respect to the sales of tangible personal property within the state upon which the members of the AGC are required to collect and remit local sales taxes, they are at a competitive disadvantage to those entities outside of the state if Plaintiffs would prevail in this action. The AGC seeks to intervene in this action on behalf of and as representative for its members who have standing to intervene herein because their burdens as taxpayers will be more and because of the competitive disadvantage that they will be at if the Plaintiffs are successful.

7. DeLong's, Blue Springs, Markenson, the Association of Counties, the Municipal League, and the AGC are entitled to intervene in this action as a matter of right under Rule 52.12(a), Missouri Rules of Civil Procedure, or alternatively, they should be allowed to intervene under Rule 52.12(b), Missouri Rules of Civil Procedure. These proposed intervenors state that they have interests relating to the subject matter of this action and that they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect those interests.

Proposed intervenors state that their interests are separate and distinct from those of the defendant, and that they should be permitted to intervene herein in order to assert that H.B. 25 to which reference is made in the Petition is not unconstitutional as alleged by the Plaintiffs in their Petition.

8. Attached hereto is a "First Amended Answer of Intervenor-Defendants" which the movants for intervention request that the Court, upon permitting them to intervene, allow and order to be filed.

9. Confirming earlier oral notice to counsel for the Plaintiffs, notice is hereby given that this First Amended Motion for Intervention will be called for hearing on June 5, 1992, before the Circuit Court of Cole County at 11:00 a.m., or as soon thereafter as counsel may be heard.

WHEREFORE, DeLong's, Incorporated, the City of Blue Springs, Gary Markenson, the Missouri Association of Counties, the Missouri Municipal League, and the Associated General Contractors of Missouri move that they be permitted to intervene herein and to file the First Amended Answer of Intervenor-Defendants which is attached hereto.

HUSCH & EPPENBERGER

BY /s/ Alex Bartlett
Alex Bartlett, #17836
235 East High Street, Suite 300
P. O. Box 1251
Jefferson City, Missouri 65102
PHONE: (314) 635-9118

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF COLE COUNTY, MISSOURI

Case No. CV192-15CC

ASSOCIATED INDUSTRIES OF MISSOURI and
ALUMAX FOILS, INC.,
Plaintiffs,

v.

DIRECTOR OF REVENUE,
Defendant,

and

DELONG'S, INCORPORATED,
CITY OF BLUE SPRINGS, GARY MARKENSON,
MISSOURI ASSOCIATION OF COUNTIES,
MISSOURI MUNICIPAL LEAGUE, and
ASSOCIATED GENERAL CONTRACTORS
OF MISSOURI,
Intervenor-Defendants.

FIRST AMENDED ANSWER OF INTERVENOR-DEFENDANTS

Come now the Intervenor-Defendants, DeLong's, Incorporated, the City of Blue Springs, Gary Markenson, the Missouri Association of Counties, the Missouri Municipal League, and the Associated General Contractors of Missouri, by their attorneys, and for their answer to plaintiffs' Petition for Declaratory Judgment and Injunction state as follows:

GENERAL ALLEGATIONS

1. Intervenor-Defendant DeLong's, Incorporated ("DeLong's"), is a Missouri corporation with its principal place of business in Jefferson City, Cole County, Missouri. DeLong's is engaged in the steel business in Jefferson City, and sells its

steel products in Missouri and also out of state. DeLong's is a Missouri taxpayer and pays state and local taxes including state and local sales taxes. DeLong's collects state and local sales taxes upon its products which it sells in intrastate commerce within Missouri. DeLong's collect use taxes of other states on certain products which it sells out of state in interstate commerce and pays use taxes in Missouri in [*sic*] certain products which it purchases from out of state. The business in which DeLong's is engaged is a highly competitive business, and DeLong's is at a competitive disadvantage when out of state steel manufacturers sell their products in interstate commerce from outside Missouri to within Missouri without the necessity of having to collect or pay use taxes for local purposes in Missouri or a substitute therefore. With respect to sales which are made by DeLong's within Jefferson City, such sales are subjected to local sales taxes approved and put into effect by Jefferson City (1% for regular purposes and .5% for transportation purposes) and Cole County (.5% for capital improvement purposes) for a combined local sales tax rate of 2%. Said 2% local sales tax rate exceeds the use tax rate of 1.5% for local purposes provided for in H.B. 25 referred to in the Petition. DeLong's therefore has an interest in the issues raised in this litigation, has standing herein, and intervenes in this action because its burdens as a Missouri taxpayer will be more if H.B. 25 is declared unconstitutional and because of the competitive disadvantage that it would be at if the Plaintiffs are successful.

2. The City of Blue Springs ("Blue Springs") is a municipality located in Jackson County, Missouri. Local sales taxes have been approved and put into effect by Blue Springs pursuant to authorization by state law with respect to sales occurring within Blue Springs. Blue Springs has approved and put into effect a 1% sales tax for regular purposes and a .5% sales tax for transportation purposes, for a total rate of 1.5%. In addition, Jackson County has approved and put into effect for sales in Jackson County, including sales in Blue Springs, a .5% sales tax for

regular purposes and a .25% sales tax for general purposes, for a total tax rate of .75%. Consequently, sales made within Blue Springs are subject to a combined local sales tax rate of 2.25%. Said 2.25% local sales tax rate exceeds the use tax rate of 1.5% provided for in H.B. 25 referred to in the Petition. If the Plaintiffs are successful with their Petition, Blue Springs will lose tax revenues and accordingly be harmed and damaged. Blue Springs therefore has a legal interest in the issues raised herein and standing to participate in this action.

3. Gary Markenson ("Markenson") is a citizen and resident of Jefferson City, Cole County, Missouri. He is also a payer of sales taxes and other taxes to the City of Jefferson, the County of Cole and the State of Missouri. Markenson purchases articles in Jefferson City in intrastate commerce which are subject to local sales taxes, as described in paragraph l, above, at a tax rate of 2%. Purchases made by others in Jefferson City who make purchases from out-of-state in interstate commerce which are shipped into Jefferson City and which are subject to state use taxes are not now subject to any use tax for local purposes and will after July l, 1992, only be subject to an additional 1.5% use tax for local purposes. H.B. 25 will reduce the tax burdens on sales in intrastate commerce which now exist as compared to those tax burdens on sales in interstate commerce. If, however, Plaintiffs are successful with their Petition, those purchases made by him in intrastate commerce within Jefferson City will be subjected to much greater tax burdens than purchases made by others in interstate commerce coming into Jefferson City and he will be consequently harmed and damaged. Markenson therefore has a legal interest in the issues raised herein and standing to participate in this action.

4. Intervenor-Defendant Missouri Association of Counties (the "Association of Counties") is a Missouri not-for-profit corporation which is an association representing the interests of the counties of this state. Its members consists of Missouri

counties. The Association of Counties intervenes in this action on behalf of and as representative for its member counties who have standing to intervene in this case in their own right. The Missouri counties which the Association of Counties represent would lose tax revenues if the Plaintiffs would be successful with their petition and be accordingly harmed and damaged. The Association of Counties therefore has legal interests on behalf of its member counties in the issues raised herein and has standing to participate herein on behalf of its member counties.

5. Intervenor-Defendant Missouri Municipal League (the "Municipal League") is a benevolent corporation formed pursuant to the laws of the state of Missouri. Its members are Missouri municipalities. The Municipal League intervenes in this action on behalf of and as representative for its member municipalities who have standing to intervene in this action in their own right. If the Plaintiffs are successful with their petition, the member municipalities of the Municipal League will lose tax revenues and be accordingly harmed and damaged. The Municipal League therefore has legal interests on behalf of its member municipalities in the issues raised herein and has standing to participate herein on behalf of its member municipalities.

6. Intervenor-Defendant Associated General Contractors of Missouri (the "AGC") is a benevolent corporation formed pursuant to the laws of the state of Missouri. The AGC was organized to secure cooperation among contractors and other similar business interests in the state of Missouri in matters affecting their welfare and the welfare of the people of Missouri. The members of the AGC pay Missouri state and local taxes in Missouri, including sales and use taxes, as applicable, on purchases of tangible personal property made within and without the state. Many members of the AGC also collect and remit state and local sales taxes on sales of tangible personal property made in Missouri to purchasers located within the state. With respect to intrastate sales of tangible personal property within the state

upon which the members of the AGC are required to collect and remit local sales taxes, they are at a competitive disadvantage to those entities outside of the state making interstate sales into Missouri if Plaintiffs would prevail in this action. The AGC intervenes in this action on behalf of and as representative for its members who have standing to intervene herein because their burdens as taxpayers will be more and because of the competitive disadvantage that they will be at if the Plaintiffs are successful. The AGC therefore has legal interests on behalf of its members in the issues raised herein and has standing to participate herein on behalf of its members.

7. Intervenor-Defendants are proper parties to this action under Rule 52.12(a) or 52.12(b) Missouri Rules of Civil Procedure. Intervenor-Defendants state that they have interests relating to the subject matter of this action and that they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect those interests. Intervenor-Defendants state that their interests are separate and distinct from those of the Defendant, and that they are proper intervenors herein in order to assert that H.B. 25 to which reference is made in the Petition is not unconstitutional as alleged by the Plaintiffs in their Petition.

FIRST AMENDED ANSWER TO COUNT I

For their First Amended Answer to Count I, Intervenor-Defendants states:

8. Intervenor-Defendants incorporate by reference the allegations of paragraphs 1 through 7 above.

9. With respect to Paragraph 1 of Plaintiff's Petition, Intervenor-Defendants admit that venue is in this Court under § 508.010, RSMo. Intervenor-Defendants admit that if Plaintiffs have standing to sue and if they have alleged a cause of action or [*sic*] declaratory judgment, then jurisdiction would be properly founded upon §§ 527.010 and 527.020, RSMo.

10. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' Petition, and therefore deny the same. Intervenor-Defendants specifically deny that AIM has standing to maintain this action.

11. In response to Paragraph 3 of Plaintiffs' Petition Intervenor-Defendants admit that Alumax Foils, Inc., has its corporate headquarters in the City of St. Louis is Missouri. Intervenor-Defendants state that in the City of St. Louis where the corporate headquarters of Alumax Foils, Inc., is located and the only place in Missouri with which it alleges a connection, the local sales tax rate is 1.5%. Intervenor-Defendants therefore specifically deny that Alumax Foils, Inc., would be subject to payment of the use tax for local purposes at a rate higher than the local sales tax rate for sales at its place of business. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to each and every other allegation contained in Paragraph 3 and therefore deny the same. Intervenor-Defendants specifically deny that Alumax Foils, Inc., has a [*sic*] standing to maintain this action.

12. Intervenor-Defendants admit the allegations contained in Paragraph 4 of Plaintiffs' Petition.

13. In response to Paragraph 5 of Plaintiffs' Petition, Intervenor-Defendants state that H.B. 25, now § 144.748, RSMo Supp. 1991, effective July 2, 1992, speaks for itself and they therefore deny any characterizations by the Plaintiffs of the provisions of said enactment. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of Plaintiffs' allegation that said law requires the members of Associated Industries of Missouri and Alumax Foils, Inc., to collect or pay tax and therefore deny that allegation. Intervenor-Defendants specifically deny that AIM and Alumax Foils, Inc., have such interests and are so situated as to have standing to raise the issues which they attempt to assert herein.

14. In response to Paragraph 6 of Plaintiffs' Petition, Intervenor-Defendants state that H.B. 25, now § 144.748, RSMo Supp. 1991, effective July 2, 1992, speaks for itself and they therefore deny any characterizations by the Plaintiffs of the provisions of said enactment.

15. In response to Paragraph 7 of Plaintiffs' Petition, Intervenor-Defendants admit and state (a) that a very limited number of small Missouri municipalities and only two Missouri counties (Reynolds and Dunklin) have not authorized local sales taxes; (b) that the following locales have authorized local sales tax at rates less than 1 1/2 percent --Dexter (1.375%, population 7,559) in Stoddard County (but in Stoddard County the rates at Advance, Bell City, Bernie, Dudley and Puxico are 1.5%), Clifton Hill (.5%, population 108) in Randolph County (but in Randolph County the rates at Moberly, Huntsville and Higbee are 2.0%), New Cambria (1%, population 233) in Macon County (but in Macon County the rates at Macon, Atlanta, Bevier and LaPlata are 2%), Napolean (.5%, population 233) in Lafayette County (but in Lafayette County the rates at Lexington, Higginsville, Concordia and Corder are 2% and the rates at Bates City, Odessa and Waverly are 1.5%), Bixby and Glover (5% [*sic*] , neither are incorporated and no population figures are shown in the *Missouri Official Manual*) in Iron County (but in Iron County the rates at Ironton an [*sic*] Pilot Knob are 2% and the rates at Viburnum, Arcadia and Annapolis are 1.5%), Brandsville (.5%, population 167) in Howell County (but in Howell County the rates at West Plains and Mountain View are 2% and the rate at Willow Springs is 1.5%), Stanberry (.5%, population 1,310) in Gentry County (but in Gentry County the rate at Albany is 1.5%), Kennett (.875%, population 10,941) and Malden (1%, population 5,123) in Dunklin County, Winston (1%, population 251) in Daviess County (but in Daviess County the rate at Gallatin is 1.875% and the rates at Jamesport and Pattonsburg are 2%), Gordonville (.5%, population 345) in Cape Girardeau County (but in Cape Girardeau County the rate at Jackson is 2%, the rate

at Cape Girardeau is 1.75% and the rate at Delta is 1%), Monett (1.375%, population 6,529) in Barry County (but in Barry County the rate at Washburn is 2.5%, the rate at Cassville is 2%, and the rates at Exeter, Purdy and Seligman are 1.5%), and Farber (1%, population 418) in Audrain County (but in Audrain County the rate at Mexico is 2.5%, and the tax rates at Martinsburg, Vandalia and Vandiver are 2%); (c) that the combined local sales taxes which are imposed with respect to all but a small percentage of sales in Missouri are equal to or in excess of the rate of 1 1/2 percent; (d) that local sales taxes are now authorized by Section 94.510 (sales tax by municipalities of 1/2 or 7/8 of 1% or 1%, except City of St. Louis limited to 1 3/8%), Section 94.577 (additional sales tax by municipalities [except those located in St. Louis County] for capital improvements of 1/8, 1/4, 3/8 or 1/2 of 1%), Section 94.600 (additional sales tax for transportation purposes in the City of St. Louis, Kansas City or St. Louis County of up to 1/2 of 1%), Section 94.700 (additional sales tax for transportation purposes by municipalities of over 200 population of up to 1/2 of 1%), Section 66.600 (county sales tax for St. Louis County of 1%), Section 67.391 (additional sales tax for anti-drug purposes for Jackson County and certain other counties of 1/4 of 1%), Section 67.505 (county sales tax of 1/4, 3/8 or 1/2 of 1%), Section 67.547 (additional county sales tax of 1/4, 3/8 or 1/2 of 1%), Section 67.550 (additional sales tax for St. Charles and Jefferson Counties of 1/2 of 1%), Section 67.581 (additional sales tax for St. Louis County [divided with municipalities] of up to 275/1000 of 1%), Section 67.582 (additional sales tax for certain first class counties for law enforcement purposes of 1/4, 3/8 or 1/2 of 1%), Section 67.583 (additional sales tax for St. Francois County for county employees benefits of 1/8 of 1%), Section 67.590 (additional sales tax for Buchanan County for construction of law enforcement facilities of 3/8 of 1%), Section 67.700 (additional sales tax for any county capital improvements of 1/4, 3/8 or 1/2 of 1%), Section 67.729 (additional sales tax for counties of the first class [except St. Louis County] for storm water control and public works [shared with

municipalities in county] of 1/10 of 1%), Sections 67.730 and 67.734 (additional sales tax for Jackson County for capital improvements of 1/4, 3/8 or 1/2 of 1%) and Section 67.782 (additional sales tax for Bollinger and Cape Girardeau Counties for recreational purposes of 1%); (e) that many local sales taxes have been approved by municipalities and counties and put into effect and that as a result of the various local sales taxes most sales in Missouri are in fact taxed at or in excess of the rate of 1 1/2 per cent; (f) that once such local sales taxes are adopted there are very few instances in which the total local sales tax for the locale have been reduced; (g) that the application of a uniform 1 1/2 percent tax rate to all sales in Missouri which are subject to sales taxes results in a far *lesser* amount of total sales taxes than the total amount of local sales taxes generated by the actual application of the various local sales tax rates applicable to those sales; and (g) that even with the use tax authorized by H.B. 25 there is a lesser tax burden on sales which are subject to the use tax for local purposes provided in H.B. 25 than there is upon the sales in Missouri which are subject to local sales taxes. Intervenor-Defendants deny each and every other allegation contained in Paragraph 7 of Plaintiffs' Petition not herein specifically admitted.

16. In response to Paragraph 8 of Plaintiffs' Petition, Intervenor-Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of Plaintiffs' allegation that compliance with H.B. 25 will impose significant economic costs on the plaintiffs, and therefore, Intervenor-Defendants deny the same. Intervenor-Defendants state that they [*sic*] administrative costs of compliance by vendors with a uniform use tax of 1 1/2 per cent on a statewide basis are much less than the administrative costs of compliance by vendors with the various and varying local sales taxes. Intervenor-Defendants deny each and every other allegation contained in Paragraph 8 of Plaintiffs' Petition not herein admitted.

17. Intervenor-Defendants deny each and every allegation contained in Paragraph 9 of Plaintiffs' Petition.

18. For further answer to Paragraph 9, and in the event the Court rules that any part of H.B. 25 is unconstitutional because of a particular "identical sale in Missouri" may be subjected to less than a combined tax rate of 5.725%, in the alternative the Intervenor-Defendants state that instead of declaring H.B. 25 unconstitutional the court should limit its order (a) to determining (i) that the amount of the use tax that can be permissibly imposed on particular sales subject to use tax be limited to the amount of sales tax which can be imposed upon particular "identical sales in Missouri", (ii) that in all other respects the provisions of H.B. 25 be upheld, and (iii) that the determination as to whether or not a particular sale subject to the use tax for local purposes should be so taxed at a lesser rate should be left for determination through established administrative or tax refund procedures, or (b) to otherwise decree or sever so as to uphold the constitutional portions of H.B. 25.

19. Intervenor-Defendants deny each and every allegation contained in Paragraph 10 of Plaintiffs' Petition.

20. Intervenor-Defendants deny each and every allegation contained in Paragraph 11 of Plaintiffs' Petition.

21. Intervenor-Defendants deny each and every allegation contained in Paragraph 12 of Plaintiffs' Petition.

22. Intervenor-Defendants deny each and every allegation contained in Paragraph 13 of Plaintiffs' Petition.

23. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of Plaintiffs' Petition, and therefore deny the same.

24. Intervenor-Defendants deny each and every allegation contained in Count I of Plaintiffs' Petition, not specifically admitted herein.

25. For further answer, Intervenor-Defendants state that any tax burden upon interstate commerce by reason of the use tax authorized by H.B. 25 is less than the tax burdens on intrastate commerce imposed by local sales taxes authorized by state law and placed into effect by counties and municipalities in Missouri.

WHEREFORE, Intervenor-Defendants pray that this Court deny Plaintiffs' request for declaratory relief, declare that H.B. 25 does not violate the constitutional provisions enumerated in Plaintiffs' Petition, alternatively construe H.B. 25 in such a manner so as to uphold the application of the use tax for local purposes to the extent that it is not unconstitutional, assess all costs herein against the Plaintiffs, deny Plaintiffs' request for attorney's fees, and grant such other relief as may be proper.

FIRST AMENDED ANSWER TO COUNT II

For their First Amended Answer to Count II, Intervenor Defendants state:

26 . In response to Paragraph 15 of Plaintiffs' Petition, Intervenor-Defendants admit that if Plaintiffs have alleged a cause of action for an injunction, then jurisdiction and venue would be properly founded upon §§ 526.010 and 526.090, RSMo.

27. In response to Paragraph 16 of Plaintiffs' Petition, Intervenor-Defendants incorporate their answer to Paragraphs 2 through 14 of Count I of Plaintiffs' Petition contained in Paragraphs 1 thru 25 above as if fully set forth herein.

28. Intervenor-Defendants deny each and every allegation contained in Paragraph 17 of Plaintiffs' Petition. For further Answer Intervenor-Defendants affirmatively state that there are administrative and tax refund provisions contained in the laws of Missouri which provide a full and adequate remedy at law.

29. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations

contained in Paragraph 18 of Plaintiffs; Petition and therefore deny the same.

30. Intervenor-Defendants deny each and every allegation contained in Paragraph 19 of Plaintiffs' Petition.

31. Intervenor-Defendants deny each and every allegation contained in Count II of Plaintiffs' Petition, not specifically admitted herein.

32. Further answering, Intervenor-Defendants state that Plaintiffs have failed to state a claim for which injunctive relief can be granted.

WHEREFORE, Intervenor-Defendants pray that this Court deny Plaintiffs' request for injunctive relief, assess all costs against the Plaintiffs, and grant such other relief as may be proper.

HUSCH & EPPENBERGER

/s/ Alex Bartlett
Alex Bartlett, #17836
235 East High Street, Suite 300
P. O. Box 1251
Jefferson City, Missouri 65102
PHONE: (314) 635-9118

Attorneys for DeLong's, Incorporated, the City of Blue Springs, Gary Markenson, the Missouri Association of Counties, the Missouri Municipal League, and the Associated General Contractors of Missouri

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

[Caption omitted in printing]

STIPULATION OF FACTS

[Filed: June 24, 1992]

COME NOW, Associated Industries of Missouri and Alumax Foils, Inc. ("Plaintiffs") and Raymond T. Wagner, Jr., Director of Revenue, State of Missouri ("Defendant"), by counsel, and stipulate and agree that, except with respect to Exhibits G and H,[1] all of the following, comprising a stipulation of facts and documentary evidence, is true, competent, and material, and should constitute and be admissible exclusively for this proceeding for all purposes, without foundation, and is subject to no objection by either party as to admissibility.

1. The Court has jurisdiction and venue over this action under §§508.010(1), 527.010, 527.020, 526.010, and 526.090, RSMo. (1986), as amended.[2]

2. Plaintiff Associated Industries of Missouri ("AIM") is a not-for-profit corporation formed under the laws of Missouri which operates as a "business league" within the meaning of §501(c)(6) of the Internal Revenue Code of 1986 (as amended). AIM's members are persons, firms, partnerships and corporations engaged in business or industry in Missouri. Several of AIM's members are multistate corporations whose principal operations and headquarters are located outside Missouri.

3. AIM's principal purpose is to promote a business-oriented philosophy in Missouri and to represent the interests of its

[1] Plaintiffs reserve the right to object to the introduction of Exhibits G and H into evidence on the grounds of materiality and relevance.

[2] Unless noted otherwise, all citations herein are to the Missouri Revised Statutes (1986)(as amended)("RSMo.").

members in the Missouri General Assembly, agencies and instrumentalities of the State. AIM was organized to secure cooperation among the industrial and commercial interests in the State of Missouri in all matters national and local affecting their welfare and the welfare of the people of Missouri.

4. AIM's members pay Missouri sales and use taxes, when applicable, on purchases of tangible personal property made within and without this State. Several of AIM's members also collect and remit Missouri use tax on sales of personal property made outside Missouri to purchasers located within Missouri. AIM's Board of Directors, acting on behalf of its members which pay Missouri sales and use taxes, have authorized the filing and prosecution of this action. A copy of the resolution by which the AIM Board of Directors acted is attached hereto as ExhibitA.

5. Plaintiff Alumax Foils, Inc. ("Alumax") is a Delaware corporation headquartered at 6100 South Broadway, St.Louis, Missouri 63111. Alumax manufactures and sells foil products both within and without Missouri. In connection with its business operations, Alumax purchases tangible personal property from sellers both within and without Missouri, and pays sales and use taxes, respectively, on such purchases. Alumax currently pays approximately $3,000 per month in Missouri use tax. Alumax currently purchases products from a vendor located in St. Francois County. A purchase made in June 1992 from this vendor was subject to state and local sales tax aggregating 4.975%. Alumax is a member of AIM and is authorized to do business in Missouri.

6. Defendant Raymond T. Wagner, Jr. is the duly appointed and qualified Director of Revenue within the meaning of Art. IV, §22 of the Missouri Constitution. This action has been properly brought against Defendant in his official capacity and not individually.

7. Section 144.610 imposes a use tax of 4.225% on the sales price of tangible personal property stored, used or consumed in Missouri. Section 144.748, RSMo. (Supp. 1991), imposes a new and additional use tax of one and one-half percent (1 1/2%) (the "Additional Use Tax") on all transactions subject to tax under §§144.600 to 144.745, RSMo. Voter approval of the Additional Use Tax was not required. Effective July 1, 1992, AIM's members, Alumax, and all other persons who sell or purchase tangible personal property subject to Missouri use tax will be required to collect or pay, as appropriate, the Additional Use Tax.

8. Compliance with §144.748 will impose significant economic costs upon AIM's members and Alumax. Costs will consist, inter alia, of the payment of such tax and the administrative costs of compliance.

9. Defendant must perform all functions incident to the administration, collection, enforcement and operation of the use taxes imposed by §144.610 and §144.748.

10. Section144.020, coupled with §§43(a) and 47(a) of Art. IV of the Missouri Constitution, impose a sales tax of 4.225% on the sales price of tangible personal property sold in Missouri (the "State Sales Tax"). The laws of the State of Missouri also authorize local governments to impose multiple sales taxes on certain sales of tangible personal property sold within their jurisdiction (the "Local Sales Tax"). *See* §§66.600-.635, 67.391-.395, 67.500-.545, 67.547, 67.550-.570, 67.581-.5 83, 67.590-.594, 67.671-.674, 67.700-.727, 67.729, 67.730-.739, 67.781-.790, 92.400-420, 94.500-.550, 94.577, 94.600-.655, and 94.700-.755. In order to impose Local Sales Tax, local action is required. The law specifies whether the voters in the jurisdiction imposing the tax must approve the tax or whether a local governing body may adopt the tax. Local Sales Taxes may have sunset provisions and expire on specified dates.

11. When collection of the Additional Use Tax begins on July 1, 1992, the aggregate State and Local Sales Tax rate in certain areas of Missouri will be lower than the aggregate use tax rate imposed by §144.610 and §144.748, RSMo.

12. Among the cities imposing Local Sales Tax at rates lower than 1-1/2% are Dexter in Stoddard County; Clifton Hill in Randolph County; New Cambria in Macon County; Napoleon in Lafayette County; Bixby and Glover, both in Iron County; Brandsville in Howell County; Stanberry in Gentry County; Kennett and Malden, both in Dunklin County; Winston in Daviess County; Gordonville in Cape Girardeau County; Monett in Barry County; and Farber in Audrain County. Cities and counties which currently impose Local Sales Tax at rates equal to or higher than 1-1/2% have authority to reduce or terminate such Local Sales Tax at a subsequent date.

13. Attached as Exhibit B is a chart that reflects by city and county the local sales tax rate in effect as of April 1992.

14. Attached as Exhibit C is a true and accurate copy of S.C.S.H.C.S.H.B. 25 as enacted by the General Assembly and signed by the Governor. Attached as Exhibit D is a true and accurate copy of H.B. 25 as originally introduced in the Missouri House of Representatives.

15. As of December 31, 1991, twenty-eight states other than Missouri authorized some form of local use tax. None of these states authorized the imposition of local use tax at a rate higher than the local sales tax within the same taxing jurisdiction.

16. Other sources of tax revenue for Missouri cities and counties, besides local sales tax, may include, *inter alia*, property taxes and business license taxes on public utilities. Cities and counties have the authority to decrease the rate of these taxes, or, subject to voter approval in most cases, increase them.

17. Attached as Exhibit E is a chart which reflects the amount of taxable sales for each city and county in this state for the calendar year 1990. The first column on this chart states the name of the city; the second column states the name of the county; the third column reflects the accumulative local sales tax rate (which includes all city and county sales taxes) in effect as of June 1, 1992; the fourth column reflects the amount of taxable sales reported to the Missouri Department of Revenue for the calendar year 1990 from the area listed; and the final column is the product of the sales tax rate as of June 1, 1992 (shown in Column 3) multiplied by the amount of taxable sales for the calendar year 1990 (shown in Column 4). The final column is illustrative only and the taxes shown are therefore hypothetical.

18. Attached as Exhibit F is a summary of the data contained in Exhibit E.

19. Attached as Exhibit G is an example of a sales tax return for a company that does business in all areas of the state. All taxpayer identifying information and all information reported by the taxpayer have been obliterated on this return.[3]

20. Attached as Exhibit H is a summary of the administrative costs which the Department of Revenue estimates it would incur during the first three fiscal years in the event: (1) Section 144.748, RSMo. (House Bill 25) goes into effect; or (2) local use taxes at variable rates throughout the state are put into effect.[4]

21. Attached as Exhibit I is a chart with the heading "Local Area Sales Tax Profiles All Levies -- As of 03May92." This chart reflects every county and city sales tax which has been levied in Missouri since such taxes were authorized by statute.

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[3] Plaintiffs reserve the right to object to the introduction of Exhibit G into evidence on the grounds of materiality and relevance.

[4] Plaintiffs reserve the right to object to the introduction of Exhibit H into evidence on the grounds of materiality and relevance.

22. The following cities listed in Exhibit I as having local sales tax levies which have ended were annexed by other cities as shown below:

Area Name	Annexed By
Bridgeton Terrace	Bridgeton
Cedar City	Jefferson City
Illmo	Scott City
Lutesville	Marble Hill
Mary Ridge	St. Ann
Schuermann Heights	Woodson Terrace

23. Times Beach, Missouri, which is listed in Exhibit I as having a local sales tax levy which ended, has become an unincorporated and uninhabited area.

24. Attached as Exhibit J is a summary of information included in Exhibit I, showing all areas with sales tax levies which have ended with no subsequent levy of a tax of equal or greater amount. This chart also reflects the aggregate amount of the local levies currently remaining in effect for each jurisdiction listed.

Respectfully submitted,

William L. Webster
Attorney General

/s/ Carole Lewis Iles
Carole Lewis Iles, #33821
Assistant Attorney General
Broadway State Office Buildings
221 West High Street, 7th Floor
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-8826

Counsel for Defendant

BRYAN CAVE

/s/ Juan D. Keller
Juan D. Keller, #19864
Brenda L. Talent, #35568
211 North Broadway
St. Louis, Missouri 63102
(314) 259-2000

Counsel for Plaintiffs

EXHIBIT A

Minutes of the Annual Meeting of Associated Industries of Missouri November 7-8, 1991, St. Louis, Missouri

Bob Martin, Chairman of the Association's Tax Committee, submitted the report that appears as attachment #12.

During the course of his report, Martin submitted the following policy resolution.

"Resolved that Associated Industries of Missouri will represent our members by filing a lawsuit in opposition to the state imposed 1.5% local use tax that was contained in HB 25 that was enacted in 1991. The Association will be reimbursed for the cost of this lawsuit by special contributions from our many members that are impacted by this local use tax."

Martin moved for the adoption of this policy resolution. This motion was seconded and adopted unanimously.

A motion was made to accept the report of the Tax Committee as filed. This motion was seconded and unanimously approved.

Page 39 intentionally left blank.

Pages 40-65 intentionally omitted.

Stipulation Exhibit B may be found at pages 11-37 of the Supplemental Legal File filed in the Supreme Court of Missouri.

EXHIBIT F

1990 Local Sales Tax Report — DOR
Special Summary for Office of the Attorney General
Levies by Group

Local Tax Rate	Number Of Jurisdictions	Total Taxable Sales	Sales Tax Receipts
Under 1.5	841	2,447,630,436	17,823,858
1.5	373	14,199,531,525	212,992,973
Over 1.5	359	19,016,236,886	415,052,937
	1,573	35,663,398,848	645,869,768

1990 Local Sales Tax Report — DOR
Special Summary for Office of the Attorney General
Levies by Group — Percent of Total

Group	Number Of Jurisdictions	Total Taxable Sales	Sales Tax Receipts
Under 1.5	53.46	6.86	2.76
1.5	23.71	39.82	32.98
Over 1.5	22.82	53.32	64.26
	99.99	100.00	100.00

1990 Local Sales Tax Report — DOR
Special Summary for Office of the Attorney General
Taxable Sales and Sales Tax Receipts by Combined Local Levy

Local Tax Rate	Number Of Jurisdictions	Total Taxable Sales	Sales Tax Receipts
3.500	1	1,813,583	63,475
3.250	1	6,285,617	204,283
3.000	16	1,008,908,940	30,267,268
2.750	7	203,094,660	5,585,103
2.625	1	2,219,764	58,269
2.500	85	3,001,802,071	75,045,052
2.375	7	77,498,923	1,840,599
2.250	36	6,412,809,193	144,288,207
2.215	5	652,783,253	13,871,644
2.000	161	3,984,839,427	79,696,789
1.875	12	77,695,673	1,456,794
1.750	20	3,516,048,174	61,530,843
1.625	7	70,437,609	1,144,611
1.500	373	14,199,531,525	212,992,973
1.375	23	173,555,629	2,386,390
1.250	15	36,298,145	453,727
1.000	311	748,973,046	7,489,730
0.875	20	118,811,655	1,039,602
0.750	52	160,503,900	1,203,779
0.625	16	46,555,548	290,972
0.500	390	991,931,408	4,959,657
0.000	14	171,001,105	0
	1573	35,663,398,848	645,869,768

1990 Local Sales Tax Report — DOR
Special Summary for Office of the Attorney General
Taxable Sales and Sales Tax Receipts by Combined Local Levy
Percent of Total

Local Tax Rate	Number Of Jurisdictions	Total Taxable Sales	Sales Tax Receipts
3.500	0.06	0.01	0.01
3.250	0.06	0.02	0.03
3.000	1.02	2.83	4.69
2.750	0.45	0.57	0.86
2.625	0.06	0.01	0.01
2.500	5.40	8,42	11.62
2.375	0.45	0.22	0.28
2.250	2.29	17.98	22.34
2.125	0.32	1.83	2.15
2.000	10.24	11.17	12.34
1.875	0.76	0.22	0.23
1.750	1.27	9.86	9.53
1.625	0.45	0.20	0.18
1.500	23.71	39.82	32.98
1.375	1.46	0.49	0.37
1.250	0.95	0.10	0.07
1.000	19.77	2.10	1.16
0.875	1.27	0.33	0.16
0.750	3.31	0.45	0.19
0.625	1.02	0.13	0.05
0.500	24.79	2.78	0.77
0.000	0.89	0.48	0.00
	100.00	100.02	100.02

EXHIBIT H

ADMINISTRATIVE COSTS OF IMPLEMENTING AND COLLECTING LOCAL USE TAX

LOCAL USE TAX — VARIABLE RATES THROUGHOUT THE STATE:

FIRST FISCAL YEAR: $1,288,867
SECOND FISCAL YEAR: $1,132,160
THIRD FISCAL YEAR: $1,168,344

LOCAL USE TAX AT UNIFORM RATE STATEWIDE (AS ENACTED BY HOUSE BILL 25):

FIRST FISCAL YEAR: $123,870
SECOND FISCAL YEAR: $101,696
THIRD FISCAL YEAR: $93,002

SAVINGS RESULTING FROM UNIFORM RATE VERSUS NON-UNIFORM RATE:

FIRST FISCAL YEAR: $1,164,997
SECOND FISCAL YEAR: $1,030,464
THIRD FISCAL YEAR: $1,075,342

PLEASE NOTE:

Attachment I is the Truly Agreed and Finally Passed Fiscal Note Response for House Bill 25, which is codified as section 144.748 in the RSMo Supp 1971. This attachment shows the costs of implementing the uniform rate statewide.

Attachments II & III represent costs that would be incurred if each city and/or county were to impose local use taxes individually; therefore, the costs are expressed as ranges. The lower end of the ranges represents costs to the Department of Revenue that would have resulted whether or not any city or county ever

imposed the local use tax since the Department would need to be able to collect those taxes and would need to perform computer system modifications to accomodate [*sic*] collection. The upper end of the ranges represents the Department's costs if every city and county imposed the tax.

The figures in this sheet represent the costs that would have resulted if the local use tax were imposed at varying rates statewide rather than one uniform rate as in current law.

ATTACHMENT I

STATE OF MISSOURI
Department of Revenue
(314) 751-2110

Office of Legislation and Regulations
P.O. Box 629
Jefferson City, MO 65105-0629

TO: ROB NICHOLLS

FROM: DEEDEE TATE

DATE: MAY 21, 1991

SUBJECT: FISCAL NOTE 88-5A

Please find attached the Department of Revenue's response to the above-referenced Fiscal Note request. The estimated fiscal impact is as follows:

	FY92	FY93	FY94
General Revenue	($123,870)	$483,484 to $679,007	$521,437 to $726,737

If you have any questions regarding this matter, please feel free to contact me

DDT:rlm

Attachment

Fiscal Estimate Worksheet Fiscal Note No. 88-5A
Bill No. SCS HCS HB 25 TAFP

* * *

5. Essential objectives of the legislation from your agency's point of view.

This proposal:

* * *

C. Authorizes a statewide local use tax in the amount of one and one-half percent (1.5%) to be distributed to all political subdivisions based upon the subdivisions' pro rata share of local sales tax distributions. Distribution of the local use tax moneys to St. Louis County and all cities therein would further be apportioned based upon population.

* * *

6. Long-Range Fiscal Implications.

There would be a cost to the State in FY 92 and a gain to the State in each succeeding fiscal year attributable to the local use tax portion of the proposal.

7. Assumption and methodology used in arriving at state fiscal impact.
(Please list all references.)

ADMINISTRATIVE IMPACT:

* * *

Therefore, the only part of this proposal that affects the Department administratively is the local use tax portion. See the attached Fiscal Estimate worksheet and response to Question #8 for detailed administrative cost impact associated with administration of the local use tax.

* * *

QUESTION #7 (continued):

REVENUE IMPACT:

Revenue that would be generated by the local use tax portion of this proposal is expressed as a range. The lower end of the range represents the impact resulting from applying the local use tax to the current use tax base. The upper end of the range is the potential impact that could result if the Advisory Commission on Intergovernmental Relations (ACIR) estimates of mail order use tax transactions are correct. Since the definition of "vendor" was expanded to include certain mail order businesses during the 85th General Assembly, Second Regular Session, an increase in use tax taxable sales is anticipated; however, the actual amount of such increase is unknown.

* * *

8. Enter specific duties and responsibilities for new employees listed on page 4. (Please be detailed)

DIVISION OF TAXATION & COLLECTION:

The Division would require the services of one (1) Tax Audit Analyst II to handle technical support and coordination of initial implementation of the local use tax (including notifying affected businesses and handling problems with taxpayers resulting from confusion of adding a local rate to the use tax rate). The Analyst would also be responsible for maintenance of the use tax accounts including delinquent collections and answering taxpayer's questions via telephone calls and correspondence. Also, the Division would require one (1) Senior Accountant to handle distribution of the local use tax to political subdivisions, reports to the political subdivisions, protest accounts, and all associated accounting work that would be required by this proposal.

INFORMATION SYSTEMS DIVISION:

The Information Systems Division would be required to develop a new system for distribution of the local use taxes collected. The new system would be linked to the current use tax collection system. Testing of the new system, as well as maintenance and support of the new system, would also be required. Modifications to the existing system to accommodate the new system would also be necessary and would be performed by the Legislative Programming Group (LPG).

NOTE: Because the ISD "Legislative Programming Group" was funded during the 1st Regular Session of the 85th General Assembly, no request will be made in DCR's budget proposal for Personnel Services (PS) — $5,454 (including fringe benefits) — to modify existing programs/systems. State Data Center (SDC) costs will be requested.

OFFICE OF THE GENERAL COUNSEL:

The Office of the General Counsel anticipates litigation resulting from this proposal and would utilize one (1) existing Associate Counsel, 25% of the time, to represent the Department in such litigation.

LOCAL FISCAL ESTIMATE WORKSHEET	FISCAL NOTE 888-5A	BILL NUMBER SCS HCS HB 25 TAFP

1. ___ No Local Fiscal Effect
2. _X_ Increase Cost*
   _X_ Permissive __ Mandatory
   __ Decrease Cost
   __ Permissive __ Mandatory
4. _X_ Increase Revenue*
   _X_ Permissive _X_ Mandatory
5. _X_ Decrease Revenue*
   __ Permissive _X_ Mandatory

6. Types of Local Government Units Affected
   _X Counties __ Road District
   _X Municipalities __ Townships
   __ Ambulance District __ Water District
   __ Other Special Districts: _____

*-NOTE: The local use tax is a mandatory revenue increase; the tourism taxes will be a permissive revenue increase and unknown permissive administrative costs; the property tax change would be a mandatory revenue decrease.

I. ONE-TIME COSTS OR REVENUE FLUCTUATION FOR LOCAL GOVERNMENT $0

II. LONG-RANGE LOCAL FISCAL IMPACT

III. ESTIMATED LOCAL EFFECT

LOCAL COSTS BY PURPOSE, BUDGET FUNCTION	FY92	FY93	FY94	ANNUALIZED
SEE NOTE ABOVE	$0	$0	$0	$0
	$0	$0	$0	$0
	$0	$0	$0	$0
TOTAL LOCAL COSTS - ALL PURPOSES	$0	$0	$0	$0

IV. INCOME SOURCES	FY92	FY93	FY94	ANNUALIZED
CITIES - NOTE: These estimates are for the local use tax part of the bill only. See note above.	$0	$35,918,349	$37,714,267	$35,918,349
	TO	TO	TO	TO
	$0	$47,919,580	$50,315,559	$47,919,580
COUNTIES - NOTE: These estimates are for the local use tax part of the bill only. See note above.	$0	$22,014,472	$23,115,196	$22,014,472
	TO	TO	TO	TO
	$0	$29,370,065	$30,838,569	$29,370,065
TOTAL INCOME - ALL SOURCES	$0	$57,932,821	$60,829,462	$57,932,821
	TO	TO	TO	TO
	$0	$77,289,646	$81,154,128	$77,289,646
V. NET EFFECT ON LOCAL FUNDS	SEE NOTE ABOVE	SEE NOTE ABOVE	SEE NOTE ABOVE	SEE NOTE ABOVE
TOTAL SAVINGS	$0	--$0	$0	$0

AGENCY: DEPARTMENT OF REVENUE
ANALYST: RAY MCCARTY
PHONE NUMBER: 751-2110 DATE: 05/31/91

SOURCES OF INFORMATION:

* * *

ATTACHMENT II

LOCAL OPTION — SAME COMBINED RATE FOR SALES & USE TAX

This proposal allows political subdivisions the option of imposing local compensating use taxes. If the political subdivision does impose a local use tax, the tax must be imposed at the same rate and for the same time period as its corresponding local sales tax. Consequently, the combined rate of all local use taxes in effect within the political subdivision's taxing jurisdiction at any particular time would be equal to the combined rate of all local sales taxes in effect within the jurisdiction at the same time. Administration of this type of local use tax would be quite expensive since the Department's Information Systems Division would be required to make certain modifications to the current sales tax system as well as develop a new use tax system capable of accounting for the collection and distribution of the new local use taxes. Computer storage costs are also expected to be quite high if many local use taxes were implemented. Also, the Division of Taxation would require many additional regular FTE's to handle all facts of administration, collection, enforcement, and distribution of the taxes and some temporary FTE's to initially register accounts into the new computer system.

	FY 92	FY 93	FY 94
REVENUE & ADMINISTRATIVE IMPACT:			
LOCAL GOVERNMENTS:			
Cities	— 0 — to $27,178,965	— 0 — to $57,075,827	— 0 — to $59,929,618
Counties	— 0 — to $19,440,186	— 0 — to $40,824,391	— 0 — to $42,865,610
STATE GOVERNMENT:			
Collection Fee (General Revenue)	— 0 — to $470,901	— 0 — to $988,891	— 0 — to $1,038,336
(-) DOR Costs	($153,037) to ($1,288,867)	($4,271) to ($1,132,160)	($4,271) to ($1,168,344)
NET IMPACT TO GR:	($153,037) to ($817,967)	($4,271) to ($143,269)	($4,271) to ($130,008)

ASSUMPTIONS AND METHODOLOGY:

The effective date of the proposal is assumed to be August 28, 1991. The first local use tax is assumed to begin January 1, 1992.

The ranges shown above for revenue which may be generated by this proposal were necessary since the actual increase in taxable sales resulting from the passage of HB 960 during the 2nd Regular Session of the 85th General Assembly is unknown. The lower range represents no such increase and the higher range

represents the increase as estimated by the Advisory Commission on Intergovernmental Relations (ACIR). Ranges for the Department of Revenue's costs were used since much of the cost of the proposal will depend upon the number of political subdivisions which actually implement local use taxes and the number of businesses affected by the taxes. The lower range for costs represents costs to the Information Systems Division which would be required to prepare for collection of the tax even if no tax is actually passed. Approximately six months will be required prior to implementation of the local use tax for the Division to accomplish the necessary computer changes and system development. The high range for costs represents costs to the Division of Taxation and Collection and the Information Systems Division if all possible local use taxes were enacted. Of course, it is unlikely all political subdivisions will impose local use taxes the first fiscal year; however, the possibility does exist that all political subdivisions will eventually impose local use taxes. It is this possibility that requires the use of a range to express the Department's costs to implement this proposal.

STATE FISCAL ESTIMATE WORKSHEET	FISCAL NOTE #ATTACHMENT II		BILL NUMBER	
I. ONE TIME COSTS (Do not include in annualized)				
II. STATE COSTS BY CATEGORY	FY92	FY93	FY94	ANNUALIZED
SALARIES	$617,553	$573,918	$602,613	$573,913
FRINGE BENEFITS	$161,181	$149,793	$157,282	$149,793
EQUIPMENT & EXPENSES	$410,133	$308,449	$308,449	$308,449
TOTAL STATE COSTS - ALL CATEGORIES	$1,188,867	$1,032,160	$1,068,344	$1,032,160
III. STATE COSTS BY FUND	FY92	FY93	FY94	ANNUALIZED
GENERAL REVENUE FUNDS	$153,037 TO $1,288,867	$4,271 TO $1,132,160	$4,271 TO $1,168,344	$4,271 TO $1,132,160
OTHER	$0	$0	$0	$0
TOTAL STATE COSTS - ALL FUNDS	SEE ABOVE	SEE ABOVE	SEE ABOVE	SEE ABOVE
IV. STATE REVENUE SOURCES	FY92	FY92	FY92	ANNUALIZED
GENERAL REVENUE FUND	$0 TO $470,901	$0 TO $988,891	$0 TO $1,038,336	$0 TO $988,891
	$0	$0	$0	$0
	$0	$0	$0	$0
OTHER	$0	$0	$0	$0
TOTAL STATE REVENUE - ALL SOURCES	SEE ABOVE	SEE ABOVE	SEE ABOVE	SEE ABOVE
HIGHWAY FUNDS	$0	$0	$0	$0
TOTAL SAVINGS - ALL FUNDS	$0	$0	$0	$0
VI. NET EFFECT ON STATE FUNDS	($153,037) TO ($817,967)	($4,271) TO ($143,269)	($4,271) TO ($130,008)	($4,271) TO ($143,269)

AGENCY: DEPARTMENT OF REVENUE — SOURCES OF INFORMATION:
ANALYST: RAY MCCARTY
PHONE NUMBER: 751-2110 — DATE: 11/20/90

ANALYST'S SIGNATURE — PAGE 3 OF 9

METHODOLOGY FOR DETERMINING LOCAL USE TAX REVENUE IMPACT

$653,364,663	ALL LOCAL SALES TAX COLLECTIONS FY 89
- - - - - - - -	ALL SALES TAX TAXABLE SALES FY 89*
	EQUALS
1.9%	LOCAL SALES TAX FACTOR
X	TIMES
$4,281,911,307	USE TAX TAXABLE SALES FY 89*
	EQUALS
$81,243,173	PROJECTED USE TAX COLLECTIONS FY 89

BY PROJECTING THE FY 89 TAXABLE SALES FIGURE INTO FUTURE FISCAL YEARS, IT IS POSSIBLE TO ESTIMATE THE MAXIMUM REVENUE IMPACT WHICH MAY RESULT TO THE GENERAL REVENUE FUND AND ALL LOCAL USE TAX FUNDS. APPLYING THE RELATIVE PERCENTAGE OF COLLECTIONS FOR EACH DIFFERENT TYPE OF LOCAL USE TAX TO THE TOTAL ESTIMATED COLLECTIONS WOULD PRODUCE THE FOLLOWING FIGURES BY TYPE OF TAX:

ANNUAL GROWTH RATE: 5%

$4,281,911,307	USE TAX TAXABLE SALES FY 89
$4,496,006,872	ESTIMATED USE TAXABLE SALES FY 90
$4,720,807,216	ESTIMATED USE TAXABLE SALES FY 91
$4,956,847,577	ESTIMATED USE TAXABLE SALES FY 92
$5,204,689,956	ESTIMATED USE TAXABLE SALES FY 93
$5,464,924,453	ESTIMATED USE TAXABLE SALES FY 94

* NOTE: USE OF THE SALES TAX TAXABLE SALES FIGURE WILL PRODUCE CONSERVATIVE ESTIMATES SINCE NOT ALL TRANSACTIONS THAT ARE SUBJECT TO STATE SALES TAX ARE SUBJECT TO LOCAL SALES TAX. HOWEVER, THE FIGURES WILL BE SOMEWHAT OFFSET BY THE INCLUSION OF MAIL ORDER SALES IN THE "USE TAX TAXABLE SALES" FIGURE FOR FY 89. ESTIMATES OF MAIL ORDER SALES WERE PREPARED BY ACIR AND ADJUSTED TO REFLECT A MISSOURI GROWTH RATE OF 5%.

FISCAL YEAR 1992 (6 MONTHS)

$17,482,182	CITY USE TAXES
$8,298,209	COUNTY USE TAXES
$7,272,588	ST. LOUIS COUNTY USE TAX
$8,671,162	PUBLIC MASS TRANSIT USE TAXES
$3,776,151	COUNTY ALTERNATE USE TAXES
$93,238	COUNTY CORRECTIONAL USE TAXES
$1,025,621	CITY ALTERNATE USE TAXES
$46,619,151	ESTIMATED TOTAL LOCAL USE TAXES FY 92
$470,901	1% COLLECTION FEE TO GENERAL REVENUE

FISCAL YEAR 1993

$36,712,582	CITY USE TAXES
$17,426,239	COUNTY USE TAXES
$15,272,434	ST. LOUIS COUNTY USE TAX
$18,209,441	PUBLIC MASS TRANSIT USE TAXES
$7,929,918	COUNTY ALTERNATE USE TAXES
$195,800	COUNTY CORRECTIONAL USE TAXES
$2,153,805	CITY ALTERNATE USE TAXES
$97,900,218	ESTIMATED TOTAL LOCAL USE TAXES FY 93
$988,891	1% COLLECTION FEE TO GENERAL REVENUE

FISCAL YEAR 1994

$38,548,211	CITY USE TAXES
$18,297,551	COUNTY USE TAXES
$16,036,056	ST. LOUIS COUNTY USE TAX
$19,119,913	PUBLIC MASS TRANSIT USE TAXES
$8,326,414	COUNTY ALTERNATE USE TAXES
$205,590	COUNTY CORRECTIONAL USE TAXES
$2,261,495	CITY ALTERNATE USE TAXES
$102,795,229	ESTIMATED TOTAL LOCAL USE TAXES FY 94
$1,038,336	1% COLLECTION FEE TO GENERAL REVENUE

ATTACHMENT III

LOCAL OPTION — POTENTIALLY DIFFERENT COMBINED RATE FOR SALES & USE TAXES

This proposal allows political subdivisions the option of imposing local compensating use taxes with potentially different rates for each different type of tax. The political subdivision is not required to have the same rate as the local sales tax; therefore, this proposal is the most expensive for the Department of Revenue to administer. This proposal would require all of the changes explained for Attachment II and would require some additional programming time for the Information Systems Division during the first fiscal year. Since rates for each local use tax type could be different than the rate for the corresponding local sales tax type, the rate information necessary to process the local sales tax could not be used to process local use tax.

	FY 92	FY 93	FY 94
REVENUE & ADMINISTRATIVE IMPACT:			
LOCAL GOVERNMENTS:			
Cities	— 0 — to $27,178,965	— 0 — to $57,075,827	— 0 — to $59,929,618
Counties	— 0 — to $19,440,186	— 0 — to $40,824,391	— 0 — to $42,865,610
STATE GOVERNMENT:			
Collection Fee (General Revenue)	— 0 — to $470,901	— 0 — to $988,891	— 0 — to $1,038,336
(-) DOR Costs	($212,077) to ($1,347,907)	($4,271) to ($1,132,160)	($4,271) to ($1,168,344)
NET IMPACT TO GR:	($212,077) to ($877,007)	($4,271) to ($143,269)	$4,271) to ($130,008)

ASSUMPTIONS & METHODOLOGY: The same assumptions and methodology used for Attachment II apply to the above estimates except that approximately nine months will be required by the Information Systems Division to accomplish the computer system changes and new system development.

STATE FISCAL ESTIMATE WORKSHEET — FISCAL NOTE (ATTACHMENT III) — BILL NUMBER

I. ONE TIME COSTS (Do not include in annualized)

II. STATE COSTS BY CATEGORY	FY92	FY93	FY94	ANNUALIZED
SALARIES	$664,373	$573,918	$602,613	$573,918
FRINGE BENEFITS	$173,401	$149,793	$157,282	$149,793
EQUIPMENT & EXPENSES	$410,133	$308,449	$308,449	$308,449
TOTAL STATE COSTS - ALL CATEGORIES	$1,247,907	$1,032,160	$1,068,344	$1,032,160
III. STATE COSTS BY FUND	FY92	FY93	FY94	ANNUALIZED
GENERAL REVENUE FUNDS	$212,077 TO $1,347,907	$4,271 TO $1,132,160	$4,271 TO $1,168,344	$4,271 TO $1,132,160
OTHER	$0	$0	$0	$0
TOTAL STATE COSTS - ALL FUNDS	SEE ABOVE	SEE ABOVE	SEE ABOVE	SEE ABOVE
IV. STATE REVENUE SOURCES	FY92	FY92	FY92	ANNUALIZED
GENERAL REVENUE FUND	$0 TO $470,901	$0 TO $988,891	$0 TO $1,038,336	$0 TO $988,891
	$0	$0	$0	$0
	$0	$0	$0	$0
OTHER	$0	$0	$0	$0
TOTAL STATE REVENUE - ALL SOURCES	SEE ABOVE	SEE ABOVE	SEE ABOVE	SEE ABOVE
HIGHWAY FUNDS	$0	$0	$0	$0
TOTAL SAVINGS - ALL FUNDS	$0	$0	$0	$0
VI. NET EFFECT ON STATE FUNDS	($212,077) TO ($877,007)	($4,271) TO ($143,269)	($4,271) TO ($130,005)	($4,271) TO ($143,269)

AGENCY: DEPARTMENT OF REVENUE — SOURCES OF INFORMATION:

ANALYST: RAY MCCARTY

PHONE NUMBER: 751-2110 — DATE: 11/20/90

ANALYST'S SIGNATURE

ATTACHMENT IV

LOCAL OPTION — SAME COMBINED RATE FOR SALES & USE TAX WITH 2% COLLECTION FEE

This proposal is the same as the proposal in Attachment II, except that the collection fee which is deposited to the General Revenue Fund is increased from 1% to 2% for the local use taxes to offset the costs of collection.

	FY 92	FY 93	FY 94
REVENUE & ADMINISTRATIVE IMPACT:			
LOCAL GOVERNMENTS:			
Cities	— 0 — to $26,904,430	— 0 — to $56,499,304	— 0 — to $59,324,269
Counties	— 0 — to $19,243,821	— 0 — to $40,412,023	— 0 — to $42,432,625
STATE GOVERNMENT:			
Collection Fee (General Revenue)	— 0 — to $941,801	— 0 — to $1,977,782	— 0 — to $2,076,671
(-) DOR Costs	($153,037) to ($1,288,867)	($4,271) to ($1,132,160)	($4,271) to ($1,168,344)
NET IMPACT TO GR:	($153,037) to ($347,066)	($4,271) to $845,622	($4,271) to $908,327

ASSUMPTIONS & METHODOLOGY: The same assumptions and methodology used for Attachment II apply to the above estimates.

EXHIBIT J

LOCAL AREA SALES TAX PROFILES
SUMMARY OF DATA

Areas With Sales Tax Levies Which Have Ended
With No Subsequent Levy Of Equal or Greater Amount

Key	Area Name	Beginning Date	Ending Date	Tax Rate	Purpose	Aggregate Amount of Remaining Local Levies
00019-160-A	Boone County	JUL 86	JUL 91	0.250	Capital Improvements	.500
00021-160-A	Buchanan County	JAN 84	JAN 89	0.375	Capital Improvements	.500
00031-160-A	Cape Girardeau County	JAN 86	JAN 90	0.250	Capital Improvements	.500
00073-160-A	Gasconade County	APR 87	JAN 91	0.500	Capital Improvements	1.000
00135-160-A	Moniteau County	JAN 85	JAN 88	0.250	Special	.500
00141-160-A	Morgan County	JAN 85	JAN 86	0.500	Special	.500
00157-160-A	Perry County	JAN 87	JAN 91	0.500	Special	.500
00186-161-B	Ste. Genevieve County	OCT 86	OCT 87	0.100	Special	1.000
00187-160-A	St. Francois County	JAN 86	JAN 87	0.250	Special	.750
00189-120-A	St. Louis County	MAR 78	NOV 81	1.000	Regular	1.500
00195-160-A	Saline County	JAN 84	JAN 85	0.500	Special	.500
00199-162-A	Scotland County	APR 88	JAN 89	0.500	Law Enforcement	1.250
00201-160-A	Scott County	JAN 86	JAN 90	0.250	Capital Improvements	.500
00201-161-A	Scott County	OCT 87	JUL 89	0.250	Capital Improvements	.500
06454-161-B	Bloomsdale	OCT 86	OCT 87	1.000	Special	.000
64180-161-B	Ste. Genevieve	OCT 86	OCT 87	1.000	Special	1.500
64550-150-A	St. Joseph	OCT 89	SEP 91	0.250	Capital Improvements	1.000
65000-150-A	St. Louis	JUL 84	APR 90	0.375	Capital Improvements	1.500
65034-161-B	St. Mary	OCT 86	OCT 87	1.000	Special	1.000

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

CV192-0015CC

[Caption omitted in printing]

TRANSCRIPT OF PROCEEDINGS

[1]

On the 24th day of June, 1992, the following proceedings were held before The Honorable James F. McHenry, Judge, Division I, 19th Judicial District, sitting at Jefferson City, Cole County, Missouri

[2]

APPEARANCES

FOR THE PETITIONER:

JUAN KELLER
BRENDA TALENT
Attorneys at Law
BRYAN, CAVE
211 North Broadway
St. Louis, MO 63102

FOR THE RESPONDENT:

CAROLEE LEWIS ILES
Assistant Attorney General
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Jefferson City, MO 65101

FOR THE INTERVENOR:

ALEX BARTLETT
Attorney at Law
235 East High, The Monroe House
Jefferson City, MO 65109

INDEX

Preliminary matters

F. JOE DeLONG
Direct Examination by Mr. Bartlett
Cross-Examination by Mr. Keller

[3]

PROCEEDINGS

THE COURT: Enter your appearances for the record.

MR. KELLER: Juan Keller and Brenda Talent for the plaintiff.

MS. ISLES [sic]: Carole [sic] Isles [sic] for the Defendant, Director of Revenue.

MR. BARTLETT: Alex Bartlett for the Defendant/Intervenors.

THE COURT: Anything preliminary, folks?

MR. BARTLETT: Your Honor, I think we've stipulated to most of the record. A stipulation has been prepared between the plaintiffs and Defendant, Department of Revenue, that has been signed by counsel.

I would state for the record that the Defendant/Intervenors join in that stipulation, so that those matters may be made a part of the agreed record in this case.

Further, there will be depositions to be made a part of the record that have been taken. There are three depositions: Beth Harris, Edward H. Robb, Raymond McCarthy, and certain deposition exhibits attached to those original depositions.

By agreement, those depositions will be a part of the record with the parties reserving their [4] respective objections to relevancy and of the matters testified to.

And the — third, I would — on behalf of the intervenors, there will be certain additional agreed statements of fact that I would have the court reporter mark at this time as, I think, as an exhibit perhaps. It will be a part of the record, or I can read them in to the record.

Perhaps it would be easier to mark them — we'll mark them individually and then they will be a part of the record.

THE COURT: I think that will be best marked Intervenor 1 through 5.

MR. KELLER: Your Honor, while they're talking, Exhibit D to the stipulation is the original of House Bill 25. That's not in the stipulation. We're going to submit that separately. We'll mail that to you. And it's not terribly important, but it's not in the packet.

THE COURT: What's the House Bill?

MR. KELLER: 25.

THE COURT: I will get that in a couple days or so?

MR. KELLER: Yes, sir.

MR. BARTLETT: Your Honor, we've marked [5] Intervenor's Exhibits 1 through 5. Additional facts that would be agreed facts — exhibits — Intervenor No. 1 is with respect to Missouri Association of Counties; Intervenor No. 2 is with respect to Missouri Municipal League, Intervenor Exhibit 3 is with respect to Associated General Contractors of Missouri, Exhibit 4 is with respect to Gary Markenson (ph sp), and Exhibit 5 is with respect to the City of Blue Springs.

THE COURT: All right. Any problem with that, counsel?

MR. KELLER: No, sir.

THE COURT: Okay. Anything else?

MR. BARTLETT: I would call — whenever we get to —

MR. KELLER: I've got a couple of things on the stipulation, your Honor.

THE COURT: Okay.

MR. KELLER: You'll notice from the first part of the stipulation that we reserve the right to object to Exhibits G and H to the stipulation.

Exhibit G is a sales tax return — stipulated — that had been prepared by a Missouri tax preparer showing the administrative burden of preparing taxes based on local taxes.

Exhibit H is the physical not to House Bill [6] 25, and the purpose of Exhibit H, according to stipulation, is — one of the purposes is to show the cost to the State of Missouri if separate local use tax were imposed as opposed to a statewide rate.

The object of this, as I understand it, is to show the administrative burden on the state and on taxpayers if they have to — if they had to pay separate local use taxes as they do sales taxes. That administrative burden is urged, as I understand it, by the Attorney General as a basis for the statewide rate, and as a basis for the discrimination such as it is between the local use tax according to House Bill 25 and issuance tax.

The Supreme Court of the United States decided the Craft case last week. One of the things that Craft says is that — the ease of administration caused, or that is alleviated by a certification, foreign dividends is not a sufficient kind of health and safety concern to justify discriminatory state tax legislation with respect to economic or tax statutes.

The other thing that Kraft says with respect to this case, that has a bearing on this case, is that you don't test discrimination under the commerce clause or the foreign commerce clause, which was at issues in that case.

[7]

By looking at the broad-base, the taxation of U.S. dividends versus foreign dividends, you look at the specific transaction by transaction situation.

The relevance that Kraft has to this case is, in that respect, as I understand the position of the State, and maybe the Intervenors, one of the positions that they're taking is that if you compare the total sales tax, local sales tax against the total local use tax, there may or may not be discrimination.

What happens in this case, however, is that there's a stipulation — if you look at it — that shows that there's substantial areas of this state, including up to 25 percent of the population, where the local use tax rate is less than the local sales tax rate — I'm sorry, The local sales tax rate is less than the 1.58 local use tax.

And as we read Kraft, and as Kraft applies to this case, you look at each of those individual situations to determine if there's discrimination.

And what we've done is prepared a memorandum for you of our objections to Exhibits G and H that sets forth what we think the Kraft case says.

And I also am going to tender you a copy of the Kraft case off of LEXIS, and I've marked in yellow on page 9 of the LEXIS printout those parts of it that, [8] that we think are relevant.

THE COURT: All right.

MR. KELLER: Finally, your Honor, we think that this case is resolved by paragraphs 11 and 15 of the stipulation. Paragraph 11 says, in light of Kraft, that the local -- that the local sales tax rates in a lot of areas of this state are less than the local use tax rate under House Bill 25.

Paragraph 15 talks about 20 other states that impose local use taxes. None of those states authorize the imposition of a local use tax at a rate higher than the local sales taxes within the same taxing jurisdiction.

That's consistent with the Ohio case and the Oklahoma case that were argued to you in the Motion for Summary Judgment, which rely on the Hally Burton (ph. sp.) case; and that's what we urge as control.

That's the only preliminary matter we've got, your Honor.

THE COURT: Another [sic] other preliminary matters?

MS. ILES: I'd like to have admitted into evidence the three depositions that Mr. Bartlett referred to.

THE COURT: I thought that was part of the [9] agreement.

MR. KELLER: It is.

THE COURT: You're simply observing the objections that are there and stated, correct?

MS. ILES: Copies have already been submitted to the court by the court reporter.

THE COURT: Okay. No problem with that. Okay.

Anything else?

MR. BARTLETT: Yes. We call Joe DeLong.

F. JOE DeLONG, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BARTLETT:

Q. Would you please state your name for the record, sir?

A. F. Joe DeLong. I live at 1115 Moreau Drive, Jeff City, Missouri.

Q. And what is your business, sir?

A. I'm Chairman of the Board of DeLong's, Incorporated, a local steel fabricating company.

Q. And for how long have you been associated with DeLong's, Incorporated, either as Chairman of the Board or President?

A. Forty-seven years.

Q. Now, where is DeLong's principal office [10] located?

A. 301 Dix Road here in Jeff City.

Q. And with respect to its operation, does DeLong's, Incorporated pay state and local taxes?

A. Yes.

Q. Now, in particular, with respect to local sales taxes, what are the local sales tax rates, combined rate here in Jeff City?

A. Two percent, county and city together.

Q. And with respect to — strike that. What is your principle [sic] product?

A. Fabricated steel bridges for highway construction is our major product.

MR. KELLER: Your Honor, I'd like to state a particular objection to this line of testimony. I — it's — the position of the Plaintiffs in this case is that the discrimination is with respect to

those areas of the state where the local sales tax rate is less than the local use tax rate.

The fact that it may be higher in some areas we contend is irrelevant to the issue of discrimination. I don't want to keep interrupting, but I do want to state that objection for the record once.

THE COURT: There's no reason you shouldn't have a continuing objection, is there?

[11]

MR. BARTLETT: No.

THE COURT: Okay. You shall have it

BY MR. BARTLETT:

Q. With respect to the bridges which DeLong's, Incorporated fabricates and sells in Missouri, are those normally subject to sales taxes or are they of an exempt type:

A. Yes.

Q. Now, with respect to the building of bridges and providing the bridges, are there very many people engaged in that type of business in Missouri, type of business that you're in?

A. No. There's only one other company besides us, and they're in St. Louis, Missouri, Stupp Brothers Bridge and Iron Company.

Q. How many steel fabricators are there that will usually bid on public jobs in Missouri?

A. It will average about five to six.

Q. And those other fabricators are from out of state; is that correct?

A. Yes.

Q. How, with respect to those fabricators, whenever they supply or get the bid, are they subject, if you know, to any local use taxes in Missouri?

A. No. They only have to charge the customer [12] the state use tax.

Q. Now, within the steel fabrication industry — well, strike that. Are most of your sales on a competitive bid basis?

A. Yes. We bid aluminum on a per pound basis on each project; and it's a firm bid that — and we bid direct to the contractor then.

Q. Now, would that include a — the sales taxes within that bid?

A. Yes.

Q. Now, these would not be — are these — those aren't the articles for resale, are they?

A. No. No.

Q. Would you explain what the concept of articles for resale is, as you understand them?

A. If one sells to, say, an agent or to a store or somebody that's going to resell the project, then the State allows the manufacturer to have a resale exemption number so they don't have to charge that, but if you sell directly to the — a contractor or the end user, you have to charge both city — city, county and state sales tax.

Q. Now, have you found that as a result of the local sales taxes that you are at a competitive disadvantage without-of-state companies?

[13]

MR. KELLER: Objection. Leading, but —

BY MR. BARTLETT:

Q. Can you tell the court —

MR. BARTLETT: I'll rephrase it.

BY MR. BARTLETT:

Q. With respect to the bidding process, can you describe for the court whether or not the legal sales taxes that you have to pay put you at a competitive advantage or disadvantage?

A. Yes. We're a member of the AISC, as an example. That's the specifying agent for steel fabricators. And as an example, in 1981 — in 1991, the average profit for steel fabricators was point — 1.82, which is less than the difference an individual firm such as us have to pay in the sales tax in Missouri.

Q. So now does DeLong's also sell steel out of state?

A. Yes, uh-huh.

Q. And in that connection, does DeLong's process use tax in connection with other states?

A. Yes.

MR. BARTLETT: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION BY MR. KELLER:

[14]

Q. Mr. DeLong, you said that your chief competitor in Missouri is Stupp Brothers in St. Louis?

A. Yes.

Q. Do you know what the local stales tax rate is in St. Louis?

A. I have a record of that, but it's roughly — it's near 1, Jeff City is.

Q. Would it surprise you if it was, in fact 3 percent instead of 2?

A. No, it wouldn't surprise me.

Q. Do you out-bid Stupp Brothers very often on the jobs that you —

A. No.

Q. — that you have? Why not?

A. Well, our competition is out of state. Stupp Brothers have the same disadvantage as we do have. Stupp sells very few bridges in Missouri. He has to go out of state, too.

Q. Do you — he does a lot of work other than bridges. Most of his work is outside of the bridge area, isn't it? Doesn't he do—

A. No. I would say that probably the bulk of his work — I have no way of knowing for sure, but I would say the bulk of his work is bridge work, although he is heavy in other work, too.

[15]

Q. Do you remember whether Stupp supplied the steel, for example, for that new Mercantile building in downtown St. Louis?

A. I don't know which buildings that he furnishes. I only complete with him on bridges.

Q. Do you — in connection with those bridges, who is the purchaser of those — who is the ultimate purchaser of those bridges?

A. The general contractors, such as Bangart Brothers in St. Louis, Weber, all of the major highway contractors are purchasers. Kansas City — it's — there's, oh, generally, at each highway letting, there's at least 50 to 75 contractors bidding.

Q. Are those turnkey contractors? In other words, does the contractor bill the state? Who does the contractor bill, the State of Missouri or the Highway Department? Do you know?

A. The contractor billed it for the Highway Department.

Q. So the contract between the general contractor and the State of Missouri is a contract with the Highway Department?

A. Yes.

Q. In the steel business, do you — have you ever heard of the Becker Electric case?

[16]

A. No.

Q. Did you — have you done any — provided any steel for the State of Missouri or any of its political subdivisions where the general contractor ordered in the name of the, of the Highway Department or the city?

A. We've done, in our structural work, we've done some school project that way, where the school board pays the bills.

Q. And you don't have state or local sales tax on that, do you?

A. No. No.

Q. Why don't you do the same thing with the bridges?

A. Well, we can't do that with bridges because the state won't buy it. They're dependent on the contractor to give them

a total bid, which includes sales tax on all of the items that they purchase.

Q. So it's a decision by the State of Missouri not to buy the steel directly?

A. Yes. Now, with one exception, the State of Missouri, on the large Mississippi River and Missouri River crossing, generally they will buy that direct, take bids direct on it; and people like Stupp, who does those large jobs, will then bud the job erected.

And if you bid — if they bid that job [17] erected, those big jobs, then only have to pay sales tax on the raw material when they but it.

Q. But if the State — in those State — the State may buy the steel directly and not pay — and then there's no sales tax due, is that your testimony?

A. Yes. All state and municipalities are exempt of state, city and county taxes.

MR. KELLER: I have no further questions, your Honor.

THE COURT: Redirect.

MR. BARTLETT: I have no questions. I would simply note for the record that it's Exhibit B to the stipulation which indicates that the local sales tax for the City of St. Louis is 1.5 percent.

MR. KELLER: Ms. Talen [sic] has corrected me, too.

THE COURT: Okay. So St. Louis is, instead of 3, it's 1 and —

MR. KELLER: It's one and a half.

THE COURT: Okay. You may stand down, sir.

Thank you.

Any further evidence, folks?

MR. KELLER: No.

MS. ILES: Nothing for the State.

MR. KELLER: The Becker Electric case is a decision from the Missouri Supreme Court. You've got **[18]** enough briefs on this — since this went in effect on June 1, I planned on asking you to take the briefs that you've got. The Becker case is the only case that's not cited, indicating what Mr. DeLong testified to, that it's the choice of the State Highway Department about how they enter into this contract as to whether the local sales tax apply or not.

THE COURT: All right. We're off the record.

(Hearing adjourned.)

[Certificate omitted in printing.]

INTERVENOR'S EXHIBIT 1

Intervenor Missouri Association of Counties (the "Association of Counties") is a Missouri not-for-profit corporation which is an association representing the interests of the counties of the state. At the present time 112 Missouri counties are members of the Association of Counties. The Missouri counties which have authorized local sales taxes will receive a portion of the taxes imposed by Section 144.748, RSMo. (Supp. 1991).

INTERVENOR'S EXHIBIT 2

Intervenor Missouri Municipal League (the "Municipal League") is a benevolent corporation formed pursuant to the laws of the state of Missouri. Its members are Missouri municipalities. At the present time 540 municipalities in Missouri are members of the Municipal League. The Missouri municipalities which have authorized local sales taxes will receive a portion of the taxes imposed by Section 144.748, RSMo. (Supp. 1991).

INTERVENOR'S EXHIBIT 3

Intervenor Associated General Contractors of Missouri (the "AGC") is a benevolent corporation formed pursuant to the laws of the state of Missouri. The AGC was organized to secure cooperation among contractors and other similar business interests in the state of Missouri in matters affecting their welfare and the welfare of the people of Missouri. The members of the AGC pay state and local taxes in Missouri, including sales and use taxes, as applicable, on purchase of tangible personal property made within and without the state.

INTERVENOR'S EXHIBIT 4

Gary Markenson ("Markenson") is a citizen and resident of Jefferson City, Cole County, Missouri. He is also a payer of sales taxes and other taxes to the City of Jefferson, the County of Cole and the state of Missouri. Markenson purchases articles in

Jefferson City in intrastate commerce which are subject to local sales taxes having an aggregate tax rate of 2%.

INTERVENOR'S EXHIBIT 5

Intervenor City of Blue Springs ("Blue Springs") is a municipality located in Jackson County, Missouri. Local sales taxes have been approved and put into effect by Jackson County and Blue Springs pursuant to authorization by state law with respect to sales occurring within Blue Springs. Blue Springs has approved and put into effect a 1% sales tax for regular purposes and a .5% sales tax for transportation purposes, for a total rate of 1.5%. In addition, Jackson County has approved and put into effect for sales in Jackson County, including sales in Blue Springs, a .5% sales tax for regular purposes and a .25% sales tax for general purposes, for a total Jackson County sales tax rate of .75%. Consequently, sales made within Blue Springs are subject to a combined local sales tax rate of 2.25%. Blue Springs will receive a portion of the taxes imposed by Section 144.748, RSMo. (Supp. 1991).

[1]

* * *

DEPOSITION OF EDWARD H. ROBB, Ph.D.,

* * *

[4]

* * *

Q. State your name please.

A. Edward H. Robb.

Q. Where do you live, Dr. Robb?

A. In Columbia, Missouri.

Q. Where are you employed?

A. University of Missouri at Columbia.

Q. What school?

A. The College of Business and Public Administration.

Q. What's your position?

A. I'm the Director of the Research Center.

* * *

[26]

(EXHIBIT 5 WAS MARKED BY THE REPORTER FOR IDENTIFICATION)

Q. Exhibit 5, Deposition Exhibit 5, was Exhibit B to your affidavit?

A. Uh-huh.

* * *

[29]

* * *

Q. . . . . I get the population in Missouri at 5,217,873. Does that sound about right?

A. Uh-huh. No, actually it should be slightly less than that. We will not include the areas in Dunklin or Reynolds County. They will not be included, the areas in those counties that do not have sales taxes.

They could have been put back in, but they are the only two counties in the state that do not have a county-wide sales tax.

Q. Okay. So everybody in the state who has a zero local sales tax rate is either in Dunklin or Reynolds Counties?

A. Yes.

[30]

Q. And you don't know whether the people in those counties are in these population figures or not?

A. I know for a fact that they are not in the under 1.5 percent. We would have had to put them in.

Q. Well, I divided —

A. Let me think about that. Or did I correct that? No, they are in.

Q. So the 1,307,161, [sic] that includes —

A. It includes them.

Q. Well, if I — if I divide then 1,307,161 [sic] by 5,217,873, I get 26.58 percent of Missouri's population in areas where the local sales tax rate is less than 1.5 percent.

A. Correct.

* * *

[35]

* * *

Q. Dr. Robb, I will describe this to you as it was described to me. Ms. Iles tells me that that is the fiscal note on the bill which enacted the use tax that was the subject of this lawsuit.

Do you know what a fiscal note is?

A. Yes, I do.

Q. What is it? What is a fiscal note?

A. Well, when a piece of legislation is introduced, somebody, it may be the state agency, or it could be the oversight, I think oversight is officially responsible for generating them, will prepare a fiscal note indicating the financial impact of a particular proposed piece of legislation.

Q. Did you participate in the preparation of that fiscal note, or any of the data that's in it?

A. I don't remember having anything to do with this.

Q. Take a minute to look at it. Go ahead and look through it.

[36]

A. Okay.

Q. Now, the fiscal note, I take it, is a long document.

A. I may or may not be, depending on what is required of it.

Q. What I'm really interested in is on page 6 of 7 in this part right here.

A. Okay.

Q. That is the second part of Exhibit [H] which starts with a memorandum to Rob Nichols from DeeDee Tate. Miss Tate is the lobbyist for the Department of Revenue; correct?

A. Not any longer. She was.

Q. She was at that time?

A. She was.

Q. I am interested in what part, if any, you played in assisting in the estimate of the sales tax, or the use tax revenues on page 6 of 7 of that May 31, 1991, document.

A. I don't think we had any direct input into this, unless we — I cannot remember. The only possibility would be anticipated growth rates for sales tax receipts. I was not asked to do anything else on this, I don't think.

Q. You don't know how those numbers, Total Income All Sources, at the end of part IV — I take it that those are estimated use tax receipts, the 57 million to the $77 million?

[37]

A. Yes. Well, I guarantee that I didn't do this then. I come up with a number. I do not believe in ranges. The legislative process is uncertain enough, without giving them two numbers to choose between.

Q. Have you done any estimates of the taxes that will be collected by the local use tax?

A. No.

Q. Let's just look at this fiscal note. The maximum number for any fiscal year that they projected will be collected, at least on the fiscal note, is a maximum of a little over $81 million, and that would — that would be collected in FY '94.

A. Okay.

Q. All right. Do you see that?

A. Yes.

Q. If the tax rate is one and a half percent, in order to collect $81 million of taxes, why don't you go ahead and do it, but if you've got something you can write on, but I will represent to you that it is slightly over $5 billion of taxable sales.

A. Okay.

Q. And I got that by dividing $80 million by 1.5 percent.

A. Right.

Q. All right. The use tax — your population numbers [38] show that 26 percent of the people in this state live in jurisdictions which impose less than one and a half percent.

A. Correct.

Q. With respect to purchases by that 26 percent of the population, use taxes will be imposed on their purchases from out of state —

A. Uh-huh.

Q. — at a greater rate than their purchases from in-state?

A. That's possible.

Q. If they went to their local grocery store and bought their groceries, let's put them on the Kansas border, if they bought their groceries in Missouri, and they had a sales tax rate of less than one and a half percent, all right, let's then send them across the line into Kansas to buy groceries, their use tax rate is going to be greater than their sales tax rate, depending on where they buy those groceries.

A. That's correct. That's a possibility.

Q. What is 26 percent of $5 billion?

A. Approximately $1.2 billion, something in that range.

Q. So with respect to at least $1.2 billion or — at least potentially 1.2 billion of Missouri sales, purchases by Missourians, I'm sorry, the use tax rate would be higher [39] than the sales tax rate, the local sales tax rate, if they purchases in Missouri?

A. No, that number is unknown. We do not know — well, actually we do know several things. We know that approximately a fourth of the population lives in areas that have a combined city, county, sales tax rate of less than one and a half percent, but they have a — they represent total taxable sales of much less than that, which means that they do not shop within those jurisdictions.

Q. It means that the vendors from whom they purchase are not located in those jurisdictions?

A. That is correct.

Q. But the use tax doesn't —

A. That's right. The use tax.

Q. The use tax applies where they reside.

A. That is correct.

Q. And to whom is — let's take somebody who is in Dunklin County.

A. Okay.

Q. All right. If they drive down to Memphis to buy their suits, when they come back, they're going to pay use tax on them?

A. I don't know if they will or not.

Q. Well, they should, as a matter of law; they have a legal obligation to do that?

[40]

A. Yes.

Q. Under the statutory scheme, to whom is that use tax distributed?

A. It is going to be distributed based on the tax rates that are in effect.

Q. What amount of the use tax paid by that Dunklin County resident comes back to Dunklin County?

A. I don't know. I would have to look and see, but obviously if their rate is less than —

Q. Well, let's put that Dunklin County — there is no local county tax in Dunklin County.

A. But they could live in one of the cities that have one.

Q. All right. But the tax is distributed to the jurisdictions that impose local sales taxes?

A. Uh-huh. Right.

Q. It is not distributed to those areas of the state which impose no local sales tax; is that correct?

A. That's my understanding.

Q. So the areas of the state which impose the least, the smallest local sales tax rates, are going to benefit the least from this local use tax?

A. (Nodding head.)

Q. You're nodding yes. Is that a yes answer?

A. Yes.

[41]

Q. Do you agree with that statement?

A. Yes, based on the distribution formula.

* * *

{44]

* * *

EXAMINATION BY MR. BARTLETT:

Q. Within the figures that you've been utilizing, do you know if the motor vehicle sales taxes and the boat sales taxes are included?

A. They should be.

Q. Now, those would be imposed under the local sales tax laws at the place of residence of the purchaser; is that correct?

A. Correct.

Q. Whereas all of the other local sales taxes would be [45] imposed at the — at an office of the vendor?

A. Correct.

Q. And so if somebody lives in a rural area, say in Cole County, but they would be making their purchases — they make their purchases, say, in Jefferson City, the sales that they would be — the sales tax that would be involved there would be imposed not where they reside, but rather in Jefferson City?

A. No. The sales tax is on your place of residence.

Q. But on other sales?

A. Yes.

* * *

* * *

[1]

DEPOSITION OF RAYMOND McCARTY

* * *

[4]

* * *

Q. State your name.

A. Raymond McCarty.

Q. Where do you live?

A. Here in Jefferson City

Q. Where do you work?

A. Department of Revenue.

Q. What's your position?

A. I'm a legislative analyst II.

Q. What does that mean?

A. That means I work with the legislature. I work with fiscal notes, do fiscal notes, testify at hearings.

* * *

[12]

* * *

A. Yes. Exhibit [H] is a document that I prepared.

Q. What is that please?

A. It shows the difference in costs, in administrative costs, between implementing a local use tax at a flat rate, as opposed to imposing local use tax at a variable rate throughout the state.

Q. There is also attached to it a memorandum from DeeDee Tate to Rob Nichols. It says fiscal note 88-5A. What does that mean?

A. Right. This was the — actually I guess the sixth version of this fiscal note. They're all assigned a numerical number based on the legislative research number that's on the bill itself.

And what this represents, if you flip to the next page, is the truly agreed and finally passed version of this bill, which was House Bill 25.

[13]

Q. With respect to that, I want to turn to page 6 of 7 of the attachment to DeeDee Tate's memo.

I call your attention to the Total Income All Sources.

A. Right.

Q. Can you explain what part 4 on page 6 of 7 of the attachment to DeeDee Tate's memo does?

A. Yes. That is an estimate that we prepared that shows impact to cities and counties, and how much revenue this bill would have generated for cities and counties.

It is expressed as a range in both instances, for cities and counties. The lower end of the range, which in fiscal year '93 column here, is 35 million. That would represent what the local use tax would generate if it were imposed this date, based upon — well, with some projected increases. And that was based just on the amount of use tax that we collect now.

The upper end of the range represented an increased amount that would have been generated if a bill that was passed the year before this that required more mail order operations to register with the state.

If they actually all of them registered, based on estimates that were provided by the Advisory Commission on Intergovernmental Relations, that would be the amount that the local use tax would generate.

[14]

So the lower end of the range is a default amount, if no mail order companies signed on with the Department of Revenue. And the upper amount would represent the increase as estimated by the Advisory Commission on Intergovernmental Relations.

Q. Now, as I look at this, under part 4, cities are first?

A. Right.

Q. And the lower end of the range for them is $35 million?

A. Yes.

Q. Counties are second. The lower end of the range for them is $22 million?

A. Right.

Q. So if I add $35 million, and some $39,918,349, plus $24,014,472, does that total $57,932,821?

A. Yes, within one dollar one way or the other.

Q. And then the upper end of the range, the $47 million is added to the 29 to get 77; is that correct?

A. That's correct.

Q. Tell me how you determined the 35 million in FY '93, the 37 million in FY '94, and the annualized 35 million.

A. Okay. The annualized column — I'll do that first, because it is pretty easy to explain.

[15]

The annualized column would be the amount of impact that is experienced the first full year that a bill is in effect. And that's something that's standardized by the legislative oversight division.

These figures were computed using taxable sales that were generated on the use tax system, the use tax part of the MITS system, that were done probably in fiscal year '90, and they were projected with probably a 5 percent increase. Yes. It is a 5 percent increase. And they were based on fiscal year '89 taxable sales.

And those were the actual taxable sales that were reported from local use tax, or from use tax, consumers and vendors.

Q. Multiplied by one and a half percent?

A. Multiplied by one and a half percent.

Q. So If I wanted to find out what those sales were, I would divide $35 million by one and a half percent, and that would give me the sales?

A. The projected sales for fiscal year '93. Our responsibility is to kick them up to the years where they actually would be in effect.

Q. I understand.

A. If you wanted to find out what the taxable sales were for fiscal year '89, you could look at this worksheet, which is the

next page, and those were the total taxable [16] sales for that fiscal year.

Q. So those were the — that was from the MITS system?

A. That was from the MITS system. Those were actual taxable sales that were entered in the MITS system, in the base range.

Q. And for FY '89, those were $3,209,526,962?

A. Yes.

Q. For FY '90 — and that's July 1 to June 30, fiscal year?

A. July 1, '89 to June 30, '90. That's what we projected it would be with a 5 percent increase.

Q. And for FY '90, it was $30,370,003,310?

A. If it would have grown at 5 percent, yes.

Q. So those are projected —

A. Those are all projected numbers. The only actual figures on here is the fiscal '89 figure.

Q. Is the 5 percent increase reasonable, in your mind?

A. Up to this point it certainly was. I'm not sure that state revenues have quite grown at 5 percent since that time, but up until that point, they had grown at 5 percent historically over the last ten years.

Q. And that was a percentage rate that was generally used in making estimates by your office?

A. Yes.

Q. To the General Assembly?

* * *

[17]

* * *

Q. Ms. Iles also brought in what's been marked as Exhibit 8, and said that you could answer questions about it.

What it that?

A. This is a sample sales tax return. It is actually a sales tax return. That's the reason for the markings on there is to block out the confidential information.

This is an example of a company that does business in all areas of the state. And when we have a company like that, we have to register them for every city and every county in the state.

The counties have to be represented separately for unincorporated areas that the taxpayer may do business in. And as a result, we have in this particular case a 53-page return.

* * *

[18]

* * *

Q. So this company has at least 444 sites?

A. At least. I think it actually has eight hundred and some.

* * *

[24]

Q. What do you do with the hundreds of thousands of individual use tax returns you receive every year from Missouri citizens?

A. Well, those are not identified from — those aren't identified by location, because there is no need at this time to keep track of where those purchases were made from.

If it is a vendor selling into the state, they do have the part on their returns, usually — I didn't bring a use tax return, I don't believe. It may be here.

Q. No, it is not.

A. A use tax return is split into two parts. There is an upper part that looks identical to the sales tax return. There is a lower part that is just one line, and that's for consumers' use tax purposes. It has no location identification to it at all. It is just one blank and one rate.

Q. And that's where all the individuals would put their taxable — that's where they put their purchases?

A. Right. But out of state vendors selling into the state could have different locations that are selling into the state. The only reason that those are monitored now is for auditing purposes.

* * *

[Examination by Mr. Bartlett]

[25]

* * *

Q. And for what purpose was Exhibit A made?

A. Exhibit A was run during the course of the passage of House bill 25.

The Director at that time, Duane Benton, had asked the Information Systems Division to generate a report to show taxable sales at different rated, and how many taxable sales were at each rate, and that what that report represents.

Q. And that was at Mr. Benton's direction?

A. Yes, that was at Mr. Benton's request.

Q. And was that provided for the legislature?

[26]

A. The information from it was provided to the legislature. Mr. Benton testified in a hearing that there were —

MR. KELLER: Objection as to Mr. Benton's testimony at the hearing. That's hearsay.

BY MR. BARTLETT:

Q. You can go ahead and answer.

A. Oh, okay. There were 92 percent, I believe, of the taxable sales fell at or above the one and a half percent local tax, and there were 8 percent of the taxable sales that were below the one and a half percent local tax rate.

Q. So this data was available at the time, to the legislature, at the time of the passage?

A. It was available.

* * *

DEPOSITION EXHIBIT A

MISSOURI DEPARTMENT OF REVENUE
INFORMATION SYSTEMS BUREAU
SALES TAXES (TAXABLE SALES)
TOTALS FOR 3RD QUARTER 1990 BY ACCUMULATIVE RATE

CITY	COUNTY	ACCUMULATIVE RATE	*= JUL THRU SEP =* AMOUNT	ACCUM PERCENTAGE RATE TOTAL/ QTR TOTAL
Excelsior Springs	Ray	.07225	546,209.28	
Total by Rate =			546,209.28	0.01%
Elsberry	Lincoln	.07225	2,116,635.85	
Festus	Jefferson	.07225	29,452,271.61	
Kimmswick	Jefferson	.07225	620,600.58	
Lamar	Barton	.07225	7,602,240.19	
Moscow Mills	Lincoln	.07225	1,827,617.08	
Orrick	Ray	.07225	496,409.10	
St. Robert	Pulaski	.07225	13,630,448.27	
Troy	Lincoln	.07225	16,259,650.32	

Winfield	Lincoln	.07225	6,150,304.37	
	Total by Rate =		78,156,177.37	0.85%
Excelsior Springs	Clay	.06975	18,585,252.02	
Glasgow	Chariton	.06975	189,851.54	
Glasgow	Howard	.06975	1,682,431.85	
Nixa	Christian	.06975	5,821,022.28	
Old Monroe	Lincoln	.06975	941,586.33	
Owensville	Gasconade	.06975	7,927,990.31	
	Total by Rate =		35,148,134.33	0.38%
Carterville	Jasper	.06850	571,926.29	
	Total by Rate =		571,926.29	0.01%
Arnold	Jefferson	.06725	40,854,385.90	
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		649,940,690.07	7.10%
Canton	Lewis	.06600	2,793,407.09	
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			

	Total by Rate =		5,404,592.78	0.06%
Billings	Christian	.06475	688,933.38	
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		1,826,949,717.41	19.96%
Airport Drive	Jasper	.06350	1,371,229.39	
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		163,085,315.74	1.78%
Alexandria	Clark	.06225	369,272.31	
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		1,155,171,732.43	12.62%
Gallatin	Daviess	.06100	2,865,636.16	
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			

	Total by Rate =		33,312,842.27	0.36%
Ashland	Boone	.05975	3,314,617.85	

[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]

	Total by Rate =		899,261,373.23	9.82%
Bethany	Harrison	.05850	8,430,560.73	

[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]

	Total by Rate =		14,198,470.36	0.16%
	Andrew	.05725	2,844,004.31	

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		3,555,320,700.56	38.84%
	Lewis	.05600	1,532,968,99	

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		46,722,462.94	0.51%
	Christian	.05475	8,199,448.28	

[Names of municipalities in Christian County in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		8,528,221.93	0.09%
	Audrain	.05225	2,814,348.08	

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		257,546,619.36	2.81%
Arbyrd	Dunklin	.05100	349,605.69	
Hornersville	Dunklin	.05100	256,155.72	
Kennett	Dunklin	.05100	18,890,576.32	
	Total by Rate =		19,496,337.73	0.21%
	Boone	.4975	17,017,047.07	

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		55,837,733.71	0.61%
Jasper	.4850	11,929,426.81	

[Names of municipalities in Jasper County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		13,073,192.05	0.14%
Adair	.04725	2,224,298.12	

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		288,961,922.95	3.16%
Newton	.04600	9,997,641.60	

[Names of municipalities in Newton County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		10,767,693.61	0.12%
Dunklin	.04225	2,502,783.78	

[Names of municipalities in Dunklin County or Reynolds County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		36,561,706.77	0.40%
Quarter Total =		9,154,563,773.77	100.0%

MISSOURI DEPARTMENT OF REVENUE
INFORMATION SYSTEMS BUREAU
SALES TAXES (TAXABLE SALES)
CALENDAR YEAR 1990 - CALC USING 9206 TAX RATE

CITY	COUNTY	ACCUM LOCAL RATE	*= JAN THRU DEC =* TOTAL AMOUNT	LOCAL AMOUNT (RATE * TOT)
Excelsior Springs	Ray	.03500	1,813,583.33	63,475.42
	Total by Rate =		1,813,583.33	63,475.42
Glasgow	Howard	.03250	6,285,616.96	204,282.55
	Total by Rate =		6,285,616.96	204,282.55
Elsberry	Lincoln	.03000	8,059,172.37	241,775.17
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		1,008.908,940.05	30,267,268.21
Crystal City	Jefferson	.02750	60,755,141.26	1,670,766.38
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			

	Total by Rate =		203,094,659.79	5,585,103.15
Carterville	Jasper	.02625	2,219,764.04	58,268.81
	Total by Rate =		2,219,764.04	58,268.81
Arnold	Jefferson	.02500	166,342,105.93	4,158,552.65
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		3,001,802,070.82	75,045,051.80
Canton	Lewis	.02375	10,469,660.94	248,654.45
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		77,498,922.64	1,840,599.41
Anderson	McDonald	.02250	9,664,592.48	217,453.33
	[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]			
	Total by Rate =		6,412,809,192.85	144,288,206.87
Airport Drive	Jasper	.02125	5,279,436.83	112,188.03

[Names of municipalities in Jasper County in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		652,783,252.70	13,871,644.12
Alexandria	Clark	.02000	1,220,053.95	24,401.08

[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]

	Total by Rate =		3,984,839,426.56	79,696,788.57
Diamond	Newton	.01875	2,121,918.13	39,785.96

[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]

	Total by Rate =		77,695,673.40	1,456,793.866
Birmingham	Clay	.01750	283,654.10	4,963.95

[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]

	Total by Rate =		3,516,048,173.82	61,530,843.05
Bethany	Harrison	.01625	33,691,785.62	547,491.52

[Names of additional municipalities in which the same "Accumulative Rate" is applicable are omitted in printing.]

	Total by Rate =		70,437,609.30	1,144,611.16
Andrew		.01500	10,180,391.12	152,705.87

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		14,199,531,525.19	212,992,972.89
Lewis		.01375	5,510,895.96	75,774.82

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

	Total by Rate =		173,555,629.25	2,386,389.90
Christian		.01250	32,192,708.09	402,408.85

[Names of municipalities in Christian County or Scotland County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		36,298,145.31	453,726.83
Audrain	.01000	10,941,245.94	109,412.46

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		748,973,046.30	7,489,730.46
Newton	.00875	38,656,000.80	338,240.01

[Names of municipalities in Newton County or Dunklin County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		118,811,654.59	1,039,601.97
Clay	.00750	28,377,326.66	212,829.95

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		160,503,900.00	1,203,779.26

Jasper	.00625	42,243,369.58	264,021.06

[Names of municipalities in Jasper County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		46,555,547.90	290,972.18
Adair	.00500	8,883,439.11	44,417.20

[Names of additional counties, unincorporated areas and municipalities in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		991,931,407.96	4,959,657.08
Dunklin	.00000	9,640,975.28	0.00
Reynolds	.00000	6,410,688.71	0.00

[Names of municipalities in Dunklin County or Reynolds County in which the same "Accumulative Rate" is applied are omitted in printing.]

Total by Rate =		171,001,104.96	0.00
Year Total =		35,663,398,847.72	645,869,767.55

Supreme Court, U.S.
FILED
JAN 19 1994
OFFICE OF THE CLERK

No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

vs.

JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. When a state imposes a statewide use tax upon *inter*state sales at a rate which, in more than 50% of the state's taxing jurisdictions, is higher than the sales tax rate on identical *intra*state sales, is the resulting discrimination against interstate commerce constitutionally irrelevant merely because in the aggregate the state collects more sales taxes than use taxes?

2. Does *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), validate a state tax scheme which in numerous instances burdens interstate commerce more heavily than intrastate commerce? If so, is *General American* inconsistent with *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and should it be expressly overruled?

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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

vs.

JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Missouri, filed June 29, 1993, are reported at 857 S.W.2d 182 and are reproduced in Appendix A to the Petition for Writ of Certiorari ("Pet. Apdx.") at pages A-1 and A-25, respectively. The unreported judgment of the Circuit Court of Cole County dated July 15, 1992, is reproduced in Appendix B to the Petition at page A-35.

JURISDICTION

The opinion and judgment of the Missouri Supreme Court en banc was entered on June 29, 1993. No rehearing was sought.[1] The Petition for Writ of Certiorari was filed in this Court on September 10, 1993, and was granted on December 6, 1993. The jurisdiction of this Court rests on 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3:

> "The Congress shall have power .... To regulate commerce with foreign nations, and among the several states...."

MISSOURI REVISED STATUTES (1992):

Section 144.020:

> **"Rate of tax.** - 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> > "(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged . . . ."

[1] As the decision below was rendered by the Missouri Supreme Court en banc, no petition for rehearing is necessary to make the judgment below final for purposes of this Court's jurisdiction. STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE, pp. 110-11 (7th ed. 1993), citing *Southern R. Co. v. Clift*, 260 U.S. 316 (1922); *Market Street R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551-52 (1945).

Section 144.610:

> **"Tax imposed, property subject, who liable.** - 1.A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property ... in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020."

Section 144.748:

> **"Additional use tax . . .** - 1. In addition to the taxes imposed by section 144.610, there is hereby imposed an additional use tax in the amount of one and one-half percent upon all transactions which are subject to the taxes imposed under sections 144.600 to 144.745."

CONSTITUTION OF MISSOURI (1945, as amended):

> **Article IV, Section 43(a).** . . . "For the purpose of providing additional moneys to be expended and used by the conservation commission, department of conservation... an additional sales tax of one-eighth of one percent is hereby levied and imposed...; and an additional use tax of one-eighth of one percent is levied and imposed . . . ."
>
> **Article IV, Section 47(a).** . . . "For the purpose of providing additional moneys to be expended and used by the department of natural resources... an additional sales tax of one-tenth of one percent is hereby levied and imposed . . .; and an additional use tax of one-tenth of one percent is levied and imposed . . . ."[2]

[2] For a more complete understanding of the entire Missouri sales/use tax scheme, we have reproduced in the Addendum to this brief a more comprehensive version of the relevant statutes and constitutional provisions.

STATEMENT OF THE CASE

This case challenges the constitutionality of §144.748 of the Revised Statutes of Missouri ("RSMo"), which imposes an additional state-wide use tax of 1.5% for the privilege of using, storing or consuming tangible personal property within the State of Missouri. The additional use tax assessed under § 144.748 brings to 5.725% the total use tax charged on all purchases from out-of-state. Missouri also assesses a state-wide sales tax on all sales of tangible personal property in Missouri, but only at the rate of 4.225%. Local government units are authorized to impose additional local sales taxes. In 53% of the taxing jurisdictions in the state (841 out of 1573), however, the additional sales tax adopted locally is less than 1.5%, resulting in a total sales tax applied to in-state purchases of less than 5.725%. Therefore, in those 841 localities a resident purchasing an item from a local merchant would be taxed at a lesser rate than his neighbor who bought the identical item from a vendor in another state for use in Missouri.

The Parties

Petitioner Associated Industries of Missouri ("AIM") is a not-for-profit corporation operating as a trade association comprised of individuals and organizations engaged in business in Missouri and elsewhere. Although all of the members of AIM do business in Missouri, some of them are "multi-state corporations whose principal operations and headquarters are located outside of Missouri" (JA 32 ¶2). These members pay sales and use taxes, when applicable, on purchases of tangible personal property made within and without Missouri (JA 33 ¶4).

Several members of AIM also collect and remit Missouri use taxes on sales of personal property made by them outside of Missouri to purchasers located within Missouri (*id.*). When those companies sell goods into Missouri, they are required to collect the 1.5% additional use tax that is challenged in this case.

Petitioner Alumax Foils, Inc., is a member of AIM and is headquartered in St. Louis.[3] It buys property from sellers within and without Missouri and pays sales and use taxes, respectively, on such purchases. Alumax pays approximately $3,000 in Missouri use taxes each month (*id.* ¶5), more than one-quarter of which is attributable to the additional 1.5% tax imposed by § 144.748. Alumax also purchases products in Missouri which are subject to local sales taxes at rates less than 1.5% (*id.*). The parties stipulated that compliance with § 144.748 will impose "significant economic costs" upon AIM's members and Alumax (JA 34 ¶8).

Respondent Janette Lohman is the Director of Revenue of Missouri and is responsible for the collection of Missouri use taxes. She is the successor to Raymond T. Wagner, who was the principal defendant below, and is sued in her official capacity (JA 33 ¶6).

Respondents DeLong's, Incorporated, The City of Blue Springs, Gary Markenson, The Missouri Association of Counties, The Missouri Municipal League, and The Associated General Contractors of Missouri intervened as defendants below in support of the validity of § 144.748. The intervening business entities alleged that they would be at a "competitive disadvantage" if petitioners were successful in this action (JA 16, 18).

Missouri's Sales/Use Tax Scheme

Missouri imposes a basic 4% sales tax on all sales of tangible personal property, pursuant to § 144.020.[4] This tax is augmented by an additional levy of one-eighth of one percent under Article

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[3] Alumax Foils, Inc., is a subsidiary of Alumax Inc. It has no subsidiaries that are not wholly owned.

[4] All references are to RSMo (1986), as amended to date, unless otherwise noted.

IV, § 43(a) of the Missouri Constitution and by another one-tenth of one percent pursuant to § 47(a) thereof. Hence, the total state-wide sales tax is 4.225%. In addition, a number of statutes authorize cities and counties, with approval of the voters, to enact local sales taxes for various purposes such as law enforcement, tourism, public works, capital improvements, transportation, etc.[5] There are no statutes authorizing local political subdivisions to levy use taxes.

The Missouri "compensating use tax" is authorized by §144.610, which imposes a levy "for the privilege of storing, using or consuming within this state any article of tangible personal property... in an amount equivalent to the percentage imposed on the sales price in the sales tax law in Section 144.020." Because the one-eighth percent additional levy contained in § 43(a) of Article IV of the Constitution and the one-tenth of one percent additional tax imposed by § 47(a) are, by their terms, applicable to use taxes as well as sales taxes, the state-wide basic use tax is therefore 4.225% — exactly equivalent to the state-wide sales tax.

In 1990, in an attempt to compensate by way of a use tax for the additional sales taxes levied at the local level, the Missouri General Assembly enacted § 144.747, which provided as follows:

> "Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter." Mo. Laws 1990, H.B. 960.

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[5] *See, e.g.*, §§ 66.600-66.635; 67.500-67.545; 92.400-92.420; 94.500-94.519; 94.600-94.655; 94.700-94.745.

That measure, though duly passed by the General Assembly and signed by the Governor, was never implemented. Instead, in 1991 it was repealed as part of House Bill No. 25, which became §144.748, effective July 1, 1992, and which imposes the additional use tax of 1.5% challenged in this case.

A state-wide use tax of 5.725% is thus applicable to every interstate transaction, whereas in-state transactions carry a sales tax ranging from 4.225% to more than 7%, depending on the local sales tax rate. The parties stipulated (JA 66) that this taxing system produces the following pattern in the various taxing jurisdictions in Missouri:

Local Sales Tax Rate	No. of Jurisdictions	Total Taxable Sales
Under 1.5%	841 (53.46%)	$ 2,447,630,436 (6.86%)
1.5%	373 (23.71%)	14,199,531,525 (39.82%)
Over 1.5%	359 (22.82%)	19,016,236,886 (53.32%)
	1,573	$35,663,398,848

Although the use tax is literally applicable to *all* products to be used, stored or consumed within the state, §144.615(2) provides an *exemption* for all transactions which are subject to Missouri sales tax. With regard to property purchased in other states, §144.615(5) allows a *credit*, but only to the extent that such property has been subjected to a sales or use tax by the other state; the purchaser is required to pay a use tax to the extent of any differential.[6]

It is the responsibility of the nonresident vendor to collect the use tax if he is subject to the jurisdiction of Missouri (*i.e.*, if he has the requisite nexus). If a Missouri purchaser cannot produce

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[6] Both of these provisions are made applicable to the additional use tax by §144.748.2.

a receipt from his vendor indicating collection of the use tax, the burden remains on the purchaser to pay the use tax (§144.635).

Vendors are required to file returns quarterly and to remit use taxes collected from Missouri customers (§144.655). The failure to file a return or to pay a tax due, and the filing of any false return, can result in the imposition of criminal penalties (§§144.735-45).

The additional use tax is collected by the respondent Director of Revenue. She is authorized by statute to keep one percent of collections to reimburse her for her costs, and is directed thereafter to distribute the remaining proceeds to each political subdivision that imposes a local sales tax based upon that subdivision's pro rata percentage of sales tax collections (§§144.748.3, 144.748.6, 144.748.7).

Proceedings Below

Petitioners filed this action in the Circuit Court of Cole County, Missouri, claiming that the additional state-wide 1.5% use tax violates, *inter alia*, the Commerce and Equal Protection Clauses of the United States Constitution because it discriminates against out-of-state sales by imposing a use tax at a greater rate than would be applicable via the sales tax to many in-state sales of identical items (JA 7-8). The parties stipulated all of the relevant facts (JA 32-37). The state trial court rejected the constitutional challenge and entered judgment for respondents (Pet. Apdx. A-35). On direct appeal to the Missouri Supreme Court, the judgment was affirmed by a 6-1 vote, Chief Justice Robertson dissenting (*id.* at A-1, A-25).

The majority opinion of the Supreme Court of Missouri acknowledged the stipulated fact that in a sizeable number of cities and counties the use tax rate is higher than the sales tax rate. The court ruled that any resulting discrimination against interstate commerce was constitutionally insignificant even though

26.5% of the state's population lives in counties where the use tax rate exceeds the sales tax rate, pointing out that only 6.86% of the intrastate sales were made in such counties (*id.* at A-16-18). The court also emphasized that, because some counties have sales tax rates in excess of 5.725%, the overall amount of use tax collected state-wide is less than the aggregate sales tax collections (*id.* at A-17).

The majority placed heavy reliance on this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* said, primarily in connection with a discussion of the Equal Protection Clause, that a property tax is not unconstitutional merely because it does not treat nonresidents and residents with "mathematical exactness." The Missouri court construed *General American* to permit the Missouri system of taxation "even though in some instances they may burden interstate commerce more heavily than intrastate commerce" (Pet. Apdx. A-12). The majority attempted to distinguish later Commerce Clause cases on the ground that the taxes invalidated there "imposed higher use taxes both on an individual basis and on an average statewide basis" (*id.* at A-16). The court further held that even if those cases are not distinguishable, they are inconsistent with *General American* and that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state statutes to be constitutional" (*id.* at A-19 n.9).

The court below acknowledged that "[a]n exacting application of the dicta contained in *Halliburton* [*Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)] and certain cases following it would require invalidating §144.748" (Pet. Apdx. A-16). But finding that the Commerce Clause "does not require identical treatment of all taxpayers," the majority upheld the taxing scheme because overall "it imposes a lesser tax burden on interstate commerce than it does on intrastate commerce and the

local discrepancies do not rise to a level of quality or quantity that would demand a different result" (*id.* at A-19).[7]

Chief Justice Robertson dissented (*id.* at A-25). He rejected the majority's statistical analysis and argued that there is no *de minimis* exception to the Commerce Clause. He criticized on numerous grounds the majority's reliance on the equal protection discussion in the 1926 *General American* case and observed that the result reached there was at odds with numerous more recent Commerce Clause holdings. He concluded his dissent with these comments:

> "With respect, I do not believe the constitutionality of Missouri's tax scheme here is even fairly debatable. This state's tax is simply unconstitutional" (Pet. Apdx. A-34).

Petitioners sought review in this Court by way of certiorari, and on December 6, 1993, certiorari was granted.

SUMMARY OF THE ARGUMENT

Missouri imposes a basic state-wide sales tax of 4.225% on all sales of retail goods and a "compensating use tax" of 4.225% on goods to be used, stored or consumed in Missouri. So far, so good from a constitutional perspective. But the balance of the Missouri system departs markedly from the requirement that use taxes not discriminate as between foreign merchants and their resident competitors. In fact, the 1.5% mandatory state-wide additional use tax imposed by § 144.748 results in a higher rate applicable to interstate transactions than the sales tax rate charged on local sales in more than 53% of the cities, counties and other taxing districts in the state, which contain more than 26% of the state's population (JA 104, 107).

[7] The court also rejected petitioners' federal equal protection and due process claims and several state constitutional challenges. Only the Commerce Clause question has been brought to this Court.

The Commerce Clause requires equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). A taxing statute discriminates against interstate commerce if it provides a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). A state may not tax a transaction more heavily when it crosses state lines than when it occurs entirely within a state, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), and may not employ a tax system to induce a resident purchaser to buy at home rather than shop elsewhere. *Boston Stock Exchange*, 429 U.S. at 332.

Use taxes have only two functions: (1) to protect resident sellers from competitive disadvantages *vis-a-vis* nonresident competitors due to sales taxes required to be collected on local sales, and (2) to raise revenue. This Court has upheld use taxes on interstate transactions to the extent they are truly "complementary" to sales taxes imposed on corresponding local activities. In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Court approved a use tax which provided exact parity between the nonresident merchant and his local competitors. Subsequent cases have consistently struck down any sales/use tax system that did not comply with the "strict rule of equality adopted in *Silas Mason*." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73 (1963); *see also Maryland v. Louisiana*, 451 U.S. at 760 ("[w]e need not know how unequal the tax is before concluding that it unconstitutionally discriminates"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (discrimination affecting less than one percent of industry products is constitutionally intolerable).

The Missouri additional use tax cannot be validated on the theory relied on by the state supreme court: *i.e.*, that the widespread discrimination existing on the local level is acceptable because on a state-wide basis sales tax collections are, in the aggregate, greater than use tax revenues. The only justification

for a use tax is to level the playing field between local and nonresident competitors. It is a gross distortion to argue that discrimination against a Kentucky merchant shipping washing machines into Dunklin County, Missouri, where the sales tax rate is only 4.225% (JA 45), can constitutionally be "compensated" by a transaction involving an Iowa vendor selling refrigerators into Kansas City, where the sales tax rate is 6.475% (JA 51). The taxes are in no way "complementary" or "compensating."

This Court has invariably refused to allow states to offset the effects of discriminatory taxes by use of other taxes on different events or transactions. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Maryland v. Louisiana*, 451 U.S. at 759; *Armco, Inc. v. Hardesty*, 467 U.S. at 643. The proper comparison is between the out-of-state merchant and the in-state taxpayer who is most similarly situated. *Halliburton*, 373 U.S. at 71; *Boston Stock Exchange*, 429 U.S. at 332.

The state's attempt to defend the state-wide additional use tax on the basis of administrative convenience is unavailing, and similar arguments have regularly been rejected by this Court. *See Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___ U.S. ___, 112 S.Ct. 2365, 2371-72 (1992); *Halliburton*, 373 U.S. at 74. It ill-behooves any state to complain that it is incapable of devising a system of raising revenue that treats local and foreign interests even-handedly.

The Missouri Supreme Court, while recognizing that the additional use tax would not survive scrutiny if measured by *Halliburton* and its progeny, nevertheless sustained its validity by invoking the 68-year-old opinion of this Court in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* does not validate a sales/use tax scheme which disadvantages a sizeable segment of the intrastate market because,

inter alia, (a) it was primarily an equal protection, not a Commerce Clause, case; (b) it did not involve use taxes or the *Silas Mason* notion of "compensating" use taxes; and (c) it is contrary to numerous more recent Commerce Clause cases demanding strict parity between local and interstate commerce.

By enacting § 144.748, the Missouri General Assembly flouted the Commerce Clause in an effort to aid Missouri business and tried to swell the state's coffers at the expense of interstate commerce. The Missouri Supreme Court, mindful of state fiscal needs, abdicated its constitutional responsibility and gave little more than a perfunctory nod to this Court's Commerce Clause jurisprudence. The state can and should be required to get it right when raising revenue by a patently protectionist measure. The judgment should be reversed, and § 144.748 should be declared unconstitutional.

ARGUMENT

I. THE MISSOURI USE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE AND THEREFORE VIOLATES THE COMMERCE CLAUSE.

The stipulated facts establish that in 841 of the 1573 taxing jurisdictions in Missouri — or 53.5% — the use tax imposed upon goods purchased outside the state exceeds the sales tax that would apply to a purchase of the identical goods within those respective jurisdictions (JA 66). This is because every interstate sale is subject to a 4.225% state-wide use tax plus a mandatory 1.5% additional use tax, whereas intrastate sales are subject to a 4.225% state-wide sales tax and may be, but are not necessarily, subject to an optional local sales tax.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides that:

> The Congress shall have power... To regulate commerce with foreign nations, and among the several states...."

Although the Commerce Clause is phrased in terms of a grant of power to Congress, it has long been recognized as also having a negative sweep which forbids states from burdening the free flow of commerce across state lines. *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). The purpose of this aspect of the Commerce Clause is to create "an area of free trade" among the several states. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977), quoting *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). This "negative" component of the Commerce Clause "prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 800 (1992), quoting *New Energy*

Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). Where simple economic protectionism is effected by state legislation, a "virtually *per se* rule of invalidity" has been applied. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Applying these principles to the field of taxation, this Court has sustained a tax against Commerce Clause challenge only when it (a) is applied to an activity that has a substantial nexus with the taxing state, (b) is fairly apportioned, (c) does not discriminate against interstate commerce, and (d) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). This case concerns the "discrimination" prong of this test.

A taxing statute discriminates against interstate commerce if it "provid[es] a direct commercial advantage to local business." *Boston Stock Exchange*, 429 U.S. at 329; *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). Simply and fundamentally stated, the "dormant" Commerce Clause requires equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. at 759. As summarized in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), "[a] state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within a state." Hence, both from the plain language of *Complete Auto* and from the subsequent decisions of this Court, it is indisputable that "no discrimination" means "no discrimination."

A. The Missouri Additional Use Tax Is Inherently Protectionist and Is Facially Invalid Because It Does Not Treat Interstate and Intrastate Commerce Equally.

The Missouri use tax is a levy on the privilege of using, storing or consuming within that state property purchased outside the state which could not be subjected to a Missouri sales tax at the

time of its acquisition. *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504, 505-06 (Mo. banc 1987). On a number of occasions, this Court has been called upon to adjudicate the constitutionality of use taxes, cognizant of the fact that the only purpose for a use tax — other than revenue enhancement — is to protect local merchants against foreign competition.[8] The Court long ago announced that the Commerce Clause prohibits states from assessing taxes on the import of goods from other states because otherwise one state could establish a complete system of non-intercourse in commercial relations with all other states. *See, e.g., Guy v. City of Baltimore*, 100 U.S. 434 (1879). An early Missouri scheme that imposed a license tax on all peddlers of goods "which are not the growth, product or manufacture of this state" was struck down in *Welton v. Missouri*, 91 U.S. 275 (1875). Taxes of this kind are by nature balkanizing; and allowing one state to attach a lug to the importation of goods from neighboring states permits the embargo of foreign products, thereby in turn encouraging retaliation and isolationism and eventually destroying the concept of interstate free trade.

On the other hand, the Court has approved use taxes which equalize the tax burden between local transactions and corresponding interstate activities. *Hinson v. Lott*, 75 U.S. 148 (1868). In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937),

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[8] The Missouri Supreme Court has previously acknowledged the inherently protectionist nature of the Missouri use tax. *See R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988)("The purpose of the use tax is to protect Missouri revenue and Missouri sellers against competition from out-of-state sellers by removing any advantage which might be gained by making purchases outside the state, on which no sales tax is collected"); *Superior Aircraft Leasing Co.*, 734 S.W.2d at 506 (Use tax "eliminates 'the incentive to purchase from out-of-state merchants in order to escape local taxes thereby keeping in-state merchants competitive with sellers in other states,' and it also provides a means to augment state revenues").

the Court upheld a "complementary" use tax that produced exact parity between local and interstate transactions. The Court's rationale was articulated by Justice Cardozo:

> "Equality is the theme that runs through all the sections of the statute .... When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local." *Id.* at 583-84.

In contrast to the even-handed use tax sanctioned in *Silas Mason*, the Missouri taxing system facially discriminates against interstate commerce by imposing a mandatory additional 1.5% levy on use-tax transactions that is not applicable to sales-tax transactions. As a result, the resident purchaser of goods in more than half the state's taxing subdivisions will pay a sales tax of less than 5.725%, whereas if he orders the exact same product out of the J.C. Penney catalog, the use tax will be 5.725%. The local merchant therefore obviously has a competitive advantage when seeking customers in those localities, and the would-be Missouri buyer is discouraged from dealing with out-of-state sellers.[9]

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[9] The operation of the Missouri sales/use tax scheme demonstrates that one issue raised below by the intervenor-respondents — whether petitioners are adversely affected by §144.748 and have standing to challenge it — is spurious. As purchasers in interstate transactions, Alumax and various members of AIM pay Missouri use tax, including the additional use tax, on tangible personal property purchased outside of Missouri (JA 33 ¶4); their standing to challenge this tax is identical to that of the in-state manufacturers

(Footnote 9 continued on next page)

The financial implications of the additional use tax are significant. The Department of Revenue, in preparing its fiscal note in support of the bill that eventually became §144.748, estimated that the 1.5% additional use tax would generate between $57.9 million and $77.2 million in fiscal year 1993 (JA 75). Assuming that sales subject to use tax are spread across the state in roughly the same proportion as the population, $15 million to $20 million in additional use taxes in that one year alone would be attributable to transactions occurring in localities having a local sales tax of less than 1.5%.[10]

While lending its imprimatur to truly "complementary" use taxes, this Court has been unflinching in its requirement that the levy imposed on out-of-state competition be precisely *equal* to that assessed against local commerce. Because the use tax is by its nature protectionist and has no other function except to enrich the state fisc, this Court has been especially resolute in its insistence that *any* discrimination is unacceptable. Even slight deviations are not, and should not be, tolerated.

(Footnote 9 continued)

in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). Several members of AIM also have standing as out-of-state vendors because they collect and remit Missouri use taxes on sales of personal property made by them from outside Missouri to purchasers within the state (JA 33 ¶4). *E.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984). AIM, of course, has standing to bring a Commerce Clause challenge on behalf of its members who would have standing to sue in their own right. *Boston Stock Exchange*, 429 U.S. at 320 n.3; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 341-45 (1977).

[10] The additional use tax is imposed on the purchaser, based on his place of residence, whereas the local sales tax is levied on the seller based on the rate applicable where his place of business is located. *See Fabick & Co. v. Schaffner*, 492 S.W.2d 737 (Mo. 1973). Thus, the fact that 26% of the population lives in areas with a local sales tax rate lower than 1.5% is more significant in this case than the fact that only 6.86% of *intra*state sales are made in those areas. But even if we use the latter figure, the additional use tax would still generate $4 million to $5 million annually in those localities.

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), for example, the Court struck down a Louisiana use tax under the Commerce Clause. Although the Louisiana scheme imposed sales and use taxes at the same rate, in some transactions certain components of out-of-state products were subject to the use tax, whereas those components were not taxed in intrastate sales. The statute also exempted articles bought second-hand within Louisiana, while taxing under the use tax similar goods purchased in a different state and then imported. Even though the Louisiana state court had pronounced the discrepancy in the taxing scheme "incidental," this Court determined that the statute flunked the test of parity and thus ran afoul of the Commerce Clause:

> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Id.* at 70.

While conceding that the rationale of *Halliburton* and its progeny would "require invalidating §144.748," the Missouri Supreme Court flatly opined that the Commerce Clause "does not require identical treatment of all taxpayers" (Pet. Apdx. A-16, 19).[11] Apart from the Missouri Supreme Court's severe understatement of the extent of the discrimination inherent in the Missouri taxing scheme, that court's thesis that "a little discrimination is okay" is also at odds with, *inter alia*, *Bacchus*, 468 U.S. 263 (1984). The *Bacchus* Court rejected a "*de minimis*" argument based on a substantially smaller percentage of overall sales volume than is present here. *Bacchus* dealt with an excise tax on wholesale liquor sales which exempted certain unique alcoholic

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[11] Chief Justice Robertson, in dissent, chided his colleagues for "elevating the cynic's conclusion about bureaucratic inefficiency to constitutional heights" by blessing such a patch-work taxing scheme on the theory that it was "close enough for government work" (Pet. Apdx. A-25).

beverages produced only in the taxing state. Even though the exempted sales counted for no more than 0.7739% of total liquor sales (*id.* at 268 n.9), the Court banned such discrimination against out-of-state producers as constitutionally impermissible. The Court said:

> "Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the state, there is a discriminatory effect." *Id.* at 271.

Similarly, in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988), the Court held that even if only one in-state resident is benefited and one out-of-state manufacturer adversely impacted, the Commerce Clause has still been violated because "neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."

The extent of the Missouri Supreme Court's constitutional misadventure is further illustrated by *Maryland v. Louisiana*, 451 U.S. 725 (1981), which involved a Commerce Clause challenge to a "first use" tax imposed by Louisiana on the production of natural gas. The tax was assessed against the first use of any gas imported into Louisiana and not previously taxed by another state or the United States. It was equal to the Louisiana severance tax imposed on in-state producers and was designed to equalize competition. Nonetheless, this Court, noting that Louisiana gave some credits to local interests that were not available to nonresident producers, invalidated the statute. The Court found the tax discriminatory because it provided a direct advantage to local business and thus violated the "common thread" running through the cases upholding compensatory

taxes — *i.e.*: "the equality of treatment between local and interstate commerce." *Id.* at 759.[12]

Maryland v. Louisiana was an original proceeding decided by this Court on the pleadings. Louisiana urged that further hearings were appropriate to enable it to show that the discrimination was minimal. The Court denied that request and declared the statute unconstitutional as a matter of law, stating:

> "It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 759-60.

This approach was recently reaffirmed in *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct. 2009, 2014 (1992)("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"); *accord*, *Wyoming v. Oklahoma*, 112 S. Ct. at 801 ("The volume of commerce affected measures only the *extent* of

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[12] The differing treatment of exemptions and credits that fatally afflicted the Louisiana "first use" tax is also present in the Missouri additional use tax and provides yet another basis for finding it facially invalid. A comparison of §144.615(2) with §144.615(5), both of which are applicable to the additional use tax pursuant to §144.748.2, plainly reveals that purchases made within Missouri are treated more favorably for purposes of use-tax credits than purchases made from another state. Section 144.615(2) grants a total *exemption* from use tax for any property bought in Missouri and subjected to a sales tax *in any amount*. By contrast, property purchased in another state gets only a use-tax *credit* under §144.615(5) limited to the amount of the sales tax paid to the other state. This is another significant departure from the use tax statute upheld in *Silas Mason*, which provided an identical credit for in-state and out-of-state transactions.

the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce").[13]

This Court has observed that in the oft-times murky world of sales and use taxes, there is much to be said for bright-line tests which can be readily understood and can form the basis for consistent, conforming conduct. In *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1914-15 (1992), the Court noted that bright-line rules sometimes create artificiality at their outer edges but that any such artificiality "is more than offset by the benefits of a clear rule ..." which "... firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." In the present context, a rule of strict nondiscrimination does not produce any artificiality, and reinforcement of the bright-line requirement of equality between interstate and intrastate transactions will serve to dissuade states from experimenting with creative and convoluted end-runs around the Commerce Clause.

B. The Missouri Additional Use Tax Is Not "Complementary" to the Sales Tax, and the Overall Comparison of State-wide Use Tax Collections to Sales Tax Collections Is Irrelevant.

In addition to their unpersuasive attempts to trivialize the disparity created by the Missouri system, respondents argued below — and the Missouri Supreme Court agreed — that the Missouri use tax passed constitutional muster because, on balance, more sales taxes than use taxes were collected in the state.

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[13] Of course, even if some leeway were constitutionally acceptable, the Missouri use tax could not be salvaged because, by any standard, the discrimination reflected in the record of this case is substantial and pervasive and involves millions of tax dollars annually. Hence, notwithstanding Chief Justice Robertson's characterization of the issue in his dissent, this case is not about a *de minimis* exception to the Commerce Clause.

The court acknowledged "that the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations" (Pet. Apdx. A-16). In a masterpiece of understatement, the majority remarked that the taxing mechanism on trial here "is slightly different from the typical complementary sales/use tax scheme sanctioned in *Henneford*" (Pet. Apdx. A-9). But it nonetheless legitimized the Missouri system because, on balance, the state-wide collection of sales taxes more than "compensated" for the discriminatory burden imposed on interstate commerce in certain portions of the state. This analysis is skewed, and the Missouri scheme is poles apart from any system of "compensatory" or "complementary" taxes that has ever survived Commerce Clause scrutiny in this Court.

The proper focus cannot be the state-wide effect of a myriad of different tax rates or the aggregate of taxes levied on different transactions in different parts of the state. The fact that more revenues are generated overall by Missouri's sales taxes than its use taxes is constitutionally beside the point. In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the taxing state argued that a flat tax on interstate and local vehicles did not discriminate, even though local vehicles used state highways five times as much as interstate vehicles, because it was merely a small part of a multi-tiered scheme and, overall, domestic trucks paid a higher price to use state highways than those registered in other states. Quoting J. HELLERSTEIN, STATE TAXATION ¶ 4.12[5], p. 150 (1983), the Court rebuffed the notion that the Commerce Clause was satisfied by such "offsets":

> "'[I]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing state on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens.'" 483 U.S. at 289.

This Court has consistently ruled that taxes on different events or transactions cannot be used to even up the interstate score. In *Tyler Pipe Industries*, 483 U.S. 232, the Court held that a tax on the manufacture of products ultimately sold out-of-state could not be deemed to compensate for the state's inability to impose a wholesale tax on those foreign sales. In *Maryland v. Louisiana*, the "first use" tax on imported natural gas could not be justified by a severance tax imposed on in-state producers because, according to the Court, "the two events are not comparable." 451 U.S. at 759. *Accord, Boston Stock Exchange*, 429 U.S. at 332 (extra tax burden on out-of-state sales not sustainable where it does not compensate for a like burden on in-state sales); *Westinghouse Electric*, 466 U.S. at 405-07 (overall taxing scheme cannot be used to justify even "slight" discrimination against interstate commerce).[14]

Just last term the Court rejected the suggestion that a state may balance discrimination in one county by showing hospitality to interstate commerce in another. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992), the State of Michigan made the similar claim that the discriminatory character of its waste disposal statute was ameliorated because several Michigan counties accepted out-of-state waste pursuant to a local option provided in the statute. The Court squarely repudiated this theory with the common-sense observation that in a county which had not exercised the option the discrimination "is unaffected by the fact that some other counties have adopted a different policy." 112 S.Ct. at 2025. Similarly here, the discrimination created on the

[14] Likewise, in *Armco, Inc.*, 467 U.S. 638, the state sought to defend a 0.22% gross receipts tax that exempted resident manufacturers by arguing that those local concerns paid a manufacturing tax of 0.88%. The Court said that the manufacturing tax could not be used to offset the discriminatory effect of the gross sales tax imposed on out-of-state competitors because manufacturing and wholesaling are not "substantially equivalent events." *Id.* at 643.

face of the statute is not cured by the local decisions made by less than half of Missouri's taxing jurisdictions.

To allow the state to justify discrimination based on statewide statistics would also be inconsistent with this Court's decisions rejecting arguments that governmental actions which burden or discriminate against interstate commerce should be upheld where only part of the interstate market is adversely affected, *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377-78 (1964), or where the actions are also detrimental to certain intrastate transactions, *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951). *Cf., Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816 (1993) (upholding equal protection challenge to gerrymander despite fact that whites were not proportionately underrepresented in congressional delegation).

One of the objectives of the Commerce Clause is a marketplace in which buy/sell decisions are not influenced by differentials in sales and use taxes. Endorsement of the Missouri Supreme Court's rationale would invite the creation of a multiplicity of preferential trade areas destructive of the very purpose of the Commerce Clause. For instance, Missouri could impose a use tax of 10% on all sales into the state by Kansas merchants but offset the burden of that levy by making all sales from Illinois tax-free. No one, we assume, would defend the legitimacy of such a system under the Commerce Clause, but it is conceptually indistinguishable from the Missouri sales/use tax arrangement currently before the Court. Just as the favorable treatment of customers of Illinois vendors could not fairly be described as "compensating" for the tariffs on Kansas products, so too here, the handicap accruing to nonresident merchants selling goods into the 841 jurisdictions where use taxes are higher than sales taxes is not "compensated" by different tax rates on different transactions conducted by different vendors in different counties.

In order to survive inspection under the Commerce Clause, a use tax must literally be "complementary" to the corresponding

sales tax imposed on "competing local business." HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION §2.19, p. 128 (1981). *Silas Mason* and its progeny, including *Halliburton*, have conditioned any approval of a "complementary" or "compensating" use tax upon the requirement that the nonresident merchant be accorded parity with his in-state competitors and that apples be compared to apples. In *Halliburton*, for example, the Louisiana Supreme Court had upheld the validity of the use tax by comparing the burden of the out-of-state manufacturer with that of the in-state retailer, who was subject to the same *rate* of tax. This Court disagreed, ruling that the proper comparison was between the out-of-state manufacturer and the in-state taxpayer who was most similarly situated — the local manufacturer. 373 U.S. at 71. Applying the "strict rule of equality adopted in *Silas Mason*," the *Halliburton* Court voided the Louisiana use tax for reasons that are squarely applicable here.

When out-of-state merchants doing business with customers in a given Missouri city or county are compared to the in-state taxpayers with whom they are most similarly situated — local vendors selling similar products — they are at a competitive disadvantage in more than half of Missouri's taxing subdivisions. The logical underpinning for validation of a "compensating" use tax is that it creates a level playing field for both the local merchant and the foreign enterprise in their pursuit of the same customer. That goal is not achieved by a scheme which requires a Washington apple grower to charge more tax than his local counterpart on sales into Dunklin County, Missouri, while permitting a Florida purveyor of oranges to collect a use tax on sales into Kansas City at a rate less than the local sales tax rate. The Washington apple seller is at a competitive disadvantage for which the Florida orange grower cannot constitutionally "compensate." And a Dunklin County apple connoisseur can derive little solace from the knowledge that if he lived in Kansas City

it would be comparatively cheaper, rather than more expensive, to buy from nonresident orchards.[15]

Use taxes that are truly "complementary" or "compensating" pass muster under the Commerce Clause only because the burden on a foreign merchant is equal to that of his local competitor and a resident buyer can choose between local and foreign vendors without regard to sales/use tax differentials. In *Boston Stock Exchange*, 429 U.S. at 332, the Court summarized the narrow scope of the doctrine of "compensating" use taxes:

> "In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax on the same amount. The taxes treated both transactions in the same manner."

The suggestion that discrimination against one out-of-state vendor can be ignored because there is a lesser burden in a different county on another nonresident seller perverts the concept of "compensating" or "complementary" taxes and is logically and legally flawed.

C. A Discriminatory Use Tax Cannot Be Justified by "Administrative Convenience."

As noted earlier, the Missouri General Assembly had adopted a statutory provision in 1990 that permitted local taxing units to adopt a local use tax as long as it was paired with an equivalent local sales tax. Mo. Laws 1990, H.B. 960 §1. That measure, which became §144.747, RSMo, was repealed in favor of the state-wide 1.5% additional use tax enacted in 1991 as §144.748

[15] Viewed another way, the Missouri Supreme Court's reliance on statewide statistics to justify discrimination on the local level is incompatible with the holding in *Dennis v. Higgins*, 498 U.S. 439 (1991), that the Commerce Clause confers *individual* rights.

by Mo. Laws 1991, H.B. 25. Respondents (especially intervenors) defended this legislative action by arguing below that a state-wide system which required a local use tax to be matched with a corresponding local sales tax was too hard to implement and too costly. Such attempts to justify discriminatory taxes on the basis of administrative convenience have never been accepted by this Court. *See Halliburton*, 373 U.S. at 74; *Kraft General Foods*, 112 S.Ct. 2365.

In the context of a pure revenue measure, it is hardly unfair or oppressive to require a state to adopt a scheme that taxes interstate and intrastate commerce equally. It is, frankly, unbecoming for a state to try to justify a protectionist measure of this type on the grounds that a system of fairness is unwieldy or more costly to administer.

Other states do not seem to have had difficulty keeping use tax rates within the clearly delineated bounds outlined in cases from this Court. The parties stipulated below that "[a]s of December 31, 1991, twenty-eight states other than Missouri authorized some form of local use tax. None of these states authorized the imposition of a local use tax at a rate higher than the local sales tax within the same taxing jurisdiction" (JA 35 ¶15).[16] The

[16] Parity between use tax rates and sales tax rates can be accomplished in a variety of ways. Some states simply impose state-wide sales taxes and state-wide use taxes by statute at the same rate. *E.g.*, Okla. Stat. tit. 68 §§1354, 1402. Others specifically require that if a local use tax is enacted, it must be at the same rate as the local sales tax. *E.g.*, Alaska Stat. § 29.45.650. Some statutory provisions automatically impose a local use tax — at the same rate — upon passage of a local sales tax. *E.g.*, Ark. Code § 26-74-223; § 26-74-319 (county-wide taxes); Kan. Stat. § 12-198; Minn. Stat. § 297A.14. subd.3 (county-wide taxes); Ohio Rev. Code §5741.021-.023; Wyo. Stat. §39-6-518(b), (e). Other states require local taxing units to couple local sales and compensating use taxes in the same measure, thus conditioning the enactment of a local use tax upon the simultaneous adoption of an equivalent sales tax. *E.g.*, Ark. Code § 26-75-201 (municipal sales and use tax); Fla. Stat. ch. 212.054, *et seq.*; Ga. Code § 48-8-82, §48-8-110; Haw. Rev. Stat. § 46-16.7; La. Rev. Stat. §33:2711; Neb. Rev. Stat. §77-27,142; S.C. Code §4-10-20; S.D. Codified Laws §10-52-2; Tenn. Code Ann. §67-6-702.

Commerce Clause demands that the privilege of taxing interstate commerce be cautiously and conscientiously exercised, and the experience of these other states belies respondents' "administrative convenience" argument.

II. THIS COURT'S DECISION IN *GENERAL AMERICAN TANK CAR CORP. V. DAY*, 270 U.S. 367 (1926), DOES NOT SUPPORT THE RESULT REACHED BY THE MISSOURI SUPREME COURT.

The Missouri Supreme Court paid little heed to *Halliburton* and the other use tax cases from this Court but instead relied almost completely on the 1926 decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), to vindicate the Missouri use tax scheme, notwithstanding its pervasively discriminatory structure. The majority opinion hailed the *General American* approach as "more flexible" and "more practical" (Pet. Apdx. A-13).

The major flaw in this analysis is that the portion of *General American* which the Missouri Supreme Court found so alluring did not purport to be a discourse on the Commerce Clause. Indeed, *General American* was decided against the background of the "now rejected notion that only 'direct' burdens on interstate commerce were disapproved." *Armco, Inc.*, 467 U.S. at 643 n.7. *General American* has never been relied on in any of this Court's subsequent Commerce Clause decisions and, in fact, has not been cited by this Court in any context in almost 50 years. Rather than being left to drift through the casebooks as a derelict hazard confusing the lower courts, *General American* should either be moored to its facts or sunk.

General American involved a Louisiana tax of "25 mills on the dollar 'of the assessed value of all rolling stock of nonresident... corporations, having no domicile in the State of Louisiana....'" 270 U.S. at 370. The tax was imposed not on a transaction but on a foreign corporation's property in Louisiana

and was in lieu of all local property taxes; *General American*, therefore, was not a sales/use tax case. Because the nonresident corporation could avoid the additional property tax by "becoming domiciled in a parish" and paying the local taxes without changing its actual business operations, the taxpayer's principal Commerce Clause challenge was that the statute was a "thinly disguised attempt to compel nonresidents doing interstate business in Louisiana to declare a domicile in this state." *Id.* at 372.

It was in this context that this Court considered whether the tax on the nonresident's property was "substantially" greater than the tax on residents. The Court upheld the Louisiana tax because the difference between the taxes on the property of resident and nonresident corporations was, on the record before the Court, *de minimis*. Absent a showing of discrimination "in some substantial way," the Court refused to infer that the Louisiana tax was really an attempt "to require the nonresident corporation to take out a license to do business within the state." *Id.* In other words, contrary to the interpretation placed on *General American* by the Missouri Supreme Court, that case did not hold that taxing an interstate transaction more than an intrastate transaction was permissible if the discrimination was small or localized. Rather, the *General American* Court merely refused to infer that a small or localized extra burden on the nonresident corporation was necessarily an unconstitutional attempt to force that corporation to become domiciled in the state.[17]

The majority opinion below acknowledged the lack of congruity inherent in the Missouri sales/use tax legislation and conceded that "an exacting application of the dicta contained in *Halliburton* and certain cases following it would require invalidating §144.748" (Pet. Apdx. A-16). But it then went on to hold

[17] Technically, *General American*'s discussion of the effects of discrimination was *dicta* because the Court ruled that, due to deficiencies in the evidence, the taxpayer ". . . has laid no foundation for assailing [the tax's] constitutionality." *Id.* at 375.

that even if *Halliburton* and its progeny cannot be distinguished, "they are nonetheless inconsistent with *General American*." Finding itself torn between two supposedly conflicting lines of authority, the court opted for the course of least resistance, saying that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state's statutes to be constitutional" (Pet. Apdx. A-19 n.9).[18]

The dissenting opinion of Chief Justice Robertson in the Missouri Supreme Court cogently observed that *General American* is inapposite for at least four reasons: (1) The language relied on by the majority below was developed in connection with due process and equal protection analysis, rather than with regard to the Commerce Clause; (2) *General American* dealt with property taxes rather than a sales/use tax scheme; (3) to the extent that *General American* engaged in a Commerce Clause analysis, that discussion was "abbreviated and now highly suspect" in light of recent cases such as *Kraft General Foods*, *Westinghouse Electric* and *Halliburton*; and (4) in *General American* the variation between in-state and out-of-state tax burdens was characterized as an "occasional inequality" that had occurred "one year," whereas the discrimination embedded in the Missouri use tax is systemic and permanent. *Id.* at A-29-30.

[18] Apart from being inappropriately premised on *General American*, this reliance on a presumption was misconceived. The generalized "presumption" in favor of constitutionality is really a vehicle for articulating a standard of review and does not affect the threshold judicial determination of whether there is discrimination. *See Parham v. Hughes*, 441 U.S. 347, 351-52 (1979) (plurality opinion). Moreover, the extent of any "presumption" varies with the type of legislation, *id.* at 351, and nowhere in this Court's modern Commerce Clause decisions is there any suggestion that a presumption may be used to justify demonstrated discrimination against interstate commerce. Indeed, as noted earlier, economic protectionism is subject to a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. at 642. *See also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (statute infringing right to interstate travel presumed unconstitutional); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964) (statute drawing racial classification presumed unconstitutional).

Despite its obvious inapplicability, *General American* has been a rallying point for some state courts desirous of sustaining local measures which protect and assist in-state merchants. *See Dep't of Revenue v. Warren Petroleum Corp.*, 119 N.E.2d 215 (Ill. 1954); *Lane Construction Corp. v. Comptroller of Treasury*, 178 A.2d 904 (Md. 1962); *Don McCullagh, Inc. v. State*, 93 N.W.2d 252 (Mich. 1958); *National Can Corporation v. State of Washington*, 715 P.2d 128 (Wash. 1986), *vacated sub nom. Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987).[19]

It is therefore appropriate and necessary for the Court to take this opportunity to spell out the limited import of *General American*. That case did not hold, even by implication, that discriminatory use taxes collected in more than half the state can be validated by increased sales taxes imposed in the rest of the state. *General American* was never designed as a Commerce Clause treatise on discriminatory taxation and has never been regarded as such by this Court. To the extent that it can be so read, it fosters unacceptable inequities, is inconsistent with every subsequent case from this Court — particularly in the sales/use tax context — and should be explicitly limited or overruled in pertinent part.

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[19] On the other hand, the highest courts of Ohio, Oklahoma and California have refused to be seduced by the siren of enhanced use taxes and have faithfully adhered to this Court's teachings in the use tax field. *See American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978)(system in which some counties imposed use taxes on all property purchased out-of-state but not on all property purchased in-state impermissibly discriminated against interstate commerce); *Phillips v. Oklahoma Tax Comm'n*, 577 P.2d 1278 (Okla. 1978)(where state imposed use tax of 4% and sales tax of 2%, with local option to add 1-3%, scheme violated Commerce Clause); *Woosley v. State of California*, 838 P.2d 758 (Cal. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2416 (1993) (difference in tax base between resident and nonresident motor vehicles for calculation of use tax constituted "patent" violation of Commerce Clause).

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Missouri should be reversed and §144.748 RSMo declared unconstitutional; the cause should be remanded with instructions to enjoin Respondent Lohman from collecting the additional 1.5% use tax and for such further proceedings as may be required in accordance with this Court's opinion.

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ADDENDUM

REVISED STATUTES OF MISSOURI

SALES TAX

§144.020. Rate of tax.—1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025; ***

§144.021. Imposition of tax—seller's duties.—The purpose and intent of sections 144.010 to 144.510 is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in section 144.020. The primary tax burden is placed upon the seller making the taxable sales of property or service and is levied at the rate provided for in section 144.020. ***

§144.030. Exemptions from state and local sales and use taxes.—1. There is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and from the computation of the tax levied, assessed or payable under sections 144.010 to 144.525 such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the state of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the general

assembly of the state of Missouri is prohibited from taxing or further taxing by the constitution of this state.

§144.060. Purchaser to pay sales tax—refusal, a misdemeanor—exception.—It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by sections 144.010 to 144.510 to pay, to the extent possible under the provisions of section 144.285, the amount of such tax to the person making such sale or rendering such service; any person who shall willfully and intentionally refuse to pay such tax shall be guilty of a misdemeanor; * * *

§144.190. Refund of overpayments—claim for refund—time for making claims—paid to whom—direct pay agreement for certain purchasers, collection fee deduction not permitted.

* * *

2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

USE TAX

§144.600. Title of law.—This law may be cited as the "Compensating Use Tax Law".

§144.610. Tax imposed, property subject, who liable.—1. A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on

the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

2. Every person storing, using or consuming in this state tangible personal property purchased from a vendor is liable for the tax imposed by this law, and the liability shall not be extinguished until the tax is paid to this state, but a receipt from a vendor authorized by the director of revenue under the rules and regulations that he prescribes to collect the tax, given to the purchaser in accordance with the provisions of section 144.650, relieves the purchaser from further liability for the tax to which receipt refers.

§144.615. Exemptions.—There are specifically exempted from the taxes levied in sections 144.600 to 144.745:

(1) Property, the storage, use or consumption of which this state is prohibited from taxing under the constitution or laws of the United States or of this state;

(2) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed under the Missouri sales tax law;

(3) Tangible personal property, the sale of which, if made in this state, would be exempt from or not subject to the Missouri sales tax under the provisions of subsections 2 and 3 of section 144.030;

(4) Motor vehicles, trailers, boats, and outboard motors subject to the tax imposed by section 144.440;

(5) Tangible personal property which has been subjected to a tax by any other state in this respect to its sales or use; provided, if such tax is less than the tax imposed by sections 144.600 to 144.745. such property, if otherwise taxable, shall be subject to a tax equal to the difference between such tax and the tax imposed by sections 144.600 to 144.745;

(6) Tangible personal property held by processors, retailers, importers, manufacturers, wholesalers, or jobbers solely for resale in the regular course of business;

(7) Personal and household effects and farm machinery used while an individual was a bona fide resident of another state and who thereafter became a resident of this state, or tangible personal property brought into the state by a non-resident for his own storage, use or consumption while temporarily within the state.

§144.635. Vendor to collect tax from purchasers—selling agent not liable to tax, when.—Every vendor making a sale of tangible personal property for the purpose of storage, use or consumption in this state shall collect from the purchaser an amount equal to the percentage on the sale price imposed by the sales tax law in section 144.020 and give the purchaser a receipt therefor. The required amount of the tax collected by the vendor from the purchaser shall be shown separately upon the sales slip or other evidence of sale. If a vendor is a selling agent as defined in section 144.605, and receives compensation by reason of a sale made pursuant to an order given directly to his principal by the purchaser, of which the selling agent had no knowledge at the time of the sale, and in which the selling agent did not actively or inactively participate, the selling agent shall be relieved of all liability for the collection and remittance of the taxes imposed under sections 144.600 to 144.745. Furthermore, if payment is made by the purchaser directly to the principal and the selling agent is unable to collect the tax from the purchaser, the selling

agent will be relieved from all liability for the collection of the tax imposed under sections 144.600 to 144.745 from the purchaser. Selling agents may avoid all responsibility for collection of the taxes imposed under sections 144.600 to 144.745, if their principal is a vendor registered with the director of revenue for the collection of such taxes.

§144.655. Return, when filed—payment, when due.—1. Every vendor, on or before the last day of the month following each calendar quarterly period of three months, shall file with the director or revenue a return of all taxes collected for the preceding quarter in the form prescribed by the director of revenue, showing the total sales price of the tangible personal property sold by the vendor, the storage, use or consumption of which is subject to the tax levied by this law, and other information the director of revenue deems necessary. The return shall be accompanied by a remittance of the amount of the tax required to be collected by the vendor during the period covered by the return. Returns shall be signed by the vendor or his authorized agent.

* * * *

4. Every person purchasing tangible personal property, the storage, use or consumption of which is subject to the tax levied by sections 144.600 to 144.745, who has not paid the tax due to a vendor registered in accordance with the provisions of section 144.650, shall, on or before the last day of the month following each calendar quarterly period of three months, file with the director of revenue a return for the preceding quarter in the form that the director of revenue prescribes, showing the total sales price of the tangible property purchased during the preceding quarter and any other information that the director of revenue deems necessary for the proper administration of sections 144.600 to 144.745. The return shall be accompanied by a remittance of the amount of the tax required by sections 144.600 to 144.745 to

be paid by the person. Returns shall be signed by the person liable for the tax or his duly authorized agent.

§144.696. Refund of overpayments—claim for refund—time for making claims.—Section 144.190, pertaining to the refund of overpayments, claims for refund, and the time within which refunds shall be claimed, is applicable to the tax levied under the compensating use tax law.

§144.735. Failure to make return, pay tax or keep records, penalty.—Any person required under sections 144.600 to 144.745 to pay any tax, or required by sections 144.600 to 144.745 to make a return, keep any records or supply any information, who with intent to defraud willfully fails to pay such tax, make such return, keep such records or supply such information, at the time or times required by law, shall, in addition to other penalties provided by law, and upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned in the county jail for not more than one year or by not less than two nor more than five years in the state penitentiary or by both fine and imprisonment together with the cost of prosecution.

§144.745. Violation not having a specific penalty deemed a misdemeanor.—Any person violating any of the provisions of sections 144.600 to 144.745 for which no criminal penalty is otherwise provided, upon conviction thereof, shall be deemed guilty of a misdemeanor.

§144.747. Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter. (Enacted as H.B. 960, 1990; repealed by H.B. 25, 1991).

§144.748. Additional use tax, rate collection — deposit in local use tax fund, not part of state revenue — investment — distribution to political subdivisions, procedure — unexpended balance not to lapse into general revenue. — 1. In addition to the taxes imposed by section 144.610, there is hereby imposed an additional use tax in the amount of one and one-half percent upon all transactions which are subject to the taxes imposed under sections 144.600 to 144.745. This tax shall be collected and remitted together with the taxes imposed under sections 144.600 to 144.745.

2. All provisions of sections 144.600 to 144.745 are hereby made applicable to the tax imposed under subsection 1 of this section except as herein provided and the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax.

3. All such use taxes collected by the director of revenue, less one percent for cost of collection which shall be deposited in the state's general revenue fund, shall be deposited in the "Local Use Tax Fund", which is hereby established, and shall be distributed as provided in this section in accordance with article X, section 10(b), Constitution of Missouri.

4. The additional revenue generated by this section shall not be part of the "total state revenue" within the meaning of article X, sections 17 and 18, Constitution of Missouri. The expenditure of this additional revenue shall not be an "expense of state government" under article X, section 20, Constitution of Missouri.

5. The director of revenue shall invest moneys in the local use tax fund in the same manner as nonstate funds are invested pursuant to article IV, section 15, Constitution of Missouri. All earnings resulting from the investment of moneys in the local use tax fund shall be credited to the local use tax fund.

6. Not later than the tenth day following the end of each month, the director shall distribute all moneys in the local use tax fund to each political subdivision imposing a local sales tax that is collected by the director on behalf of such political subdivision based upon the political subdivision's pro rata percentage as determined by subsection 7 of this section, except as provided in subsection 10 of this section.

7. The director of revenue shall divide the amount of local sales tax moneys distributed to each such political subdivision each month by the total amount of local sales tax moneys distributed that month to determine that political subdivision's pro rata percentage.

8. The provisions of section 33.080, RSMo, requiring all unexpended balances remaining in various state funds to be transferred and placed to the credit of the ordinary revenue fund of this state at the end of each biennium shall not apply to the local use tax fund.

9. The tax imposed under this section shall be submitted to the voters of this state only in the event that a final decision of a court of competent jurisdiction holds that the provisions of this section require voter approval.

10. After determining the amounts due pursuant to subsections 6 and 7 of this section, the director of revenue shall add the amounts that would be due all political subdivisions within any county of the first classification having a charter form of government and having a population of nine hundred thousand or more inhabitants together with the amount that would be due the unincorporated areas of such county to obtain a sum total. The director shall distribute one-third of such sum total to the county and to each city, town and village in group B according to section 66.620, RSMo, as modified by this section, a portion of the remainder of such sum total equal to the percentage ratio that the population of each such city, town and village bears to the total

population of all such group B cities, towns and villages. For the purposes of this subsection, population shall be determined by the last federal decennial census or the latest census that determines the total population of the county and all political subdivisions therein. For the purpose of this subsection, beginning on January 1, 1994, and annually thereafter, each city, town or village in group A according to section 66.620, RSMo, but whose per capita sales tax receipts during the preceding calendar year pursuant to sections 66.600 to 66.630, RSMo, were less than the per capita county-wide average of all sales tax receipts during the preceding calendar year, shall be treated as a group B city, town or village until the per capita amount distributed to such city, town or village equals the difference between the per capita sales tax receipts during the preceding calendar year and the per capita county-wide average of all sales tax receipts during the preceding calendar year.

CONSTITUTION OF MISSOURI, 1945, As Amended

Article IV

Section 43(a). Sales tax, use for conservation purposes. For the purpose of providing additional moneys to be expended and used by the conservation commission, department of conservation, for the control, management, restoration, conservation and regulation of bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, an additional sales tax of one-eighth of one percent is hereby levied and imposed upon all sellers for the privilege of selling tangible personal property or rendering taxable services at retail in this state upon the sales and services which now are or hereafter are listed and set forth in, and, except as to the amount of tax, subject to the provisions of and to be collected as provided in the "Sales Tax Law" and subject to the rules and regulations promulgated in connection therewith; and

an additional use tax of one-eighth of one percent is levied and imposed for the privilege of storing, using or consuming within this state any article of tangible personal property as set forth and provided in the "Compensating Use Tax Law" and, except as to the amount of the tax, subject to the provisions of and to be collected as provided in the "Compensating Use Tax Law" and subject to the rules and regulations promulgated in connection therewith.

Section 47(a). Sales and use tax levied for soil and water conservation and for state parks.—Sales and use tax levied for soil and water conservation and for state parks. For the purpose of providing additional monies to be expended and used by the department of natural resources through the state soil and water districts commission as defined in Section 278.070, RSMo, 1986, for the saving of the soil and water of this state for the conservation of the productive power of Missouri agricultural land, and by the department of natural resources for the acquisition, development, maintenance and operation of state parks in accordance with Chapter 253, RSMo, 1986, and for the administration of the laws pertaining thereto, an additional sales tax of one-tenth of one percent is hereby levied and imposed upon all sellers for the privilege of selling tangible personal property or rendering taxable services at retail in this state upon the sales and services which now are or hereafter are listed and set forth in, and, except as to the amount of tax, subject to the provisions of and to be collected as provided in the "Sales Tax Law" and subject to the rules and regulations promulgated in connection therewith; and an additional use tax of one-tenth of one percent is levied and imposed for the privilege of storing, using or consuming within this state any article of tangible personal property as set forth and provided in the "Compensating Use Tax Law" and, except as to the amount of the tax, subject to the provisions of and to be collected as provided in the "Compensating Use Tax Law" and subject to the rules and regulations promulgated in connection therewith.

(7)

No. 93-397

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,
vs.
JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE

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QUESTIONS PRESENTED

1. Whether a state compensatory use tax, when considered in conjunction with varying local sales taxes, violates the Commerce Clause where the state's sales-use tax system is not protectionist in purpose and in practical operation favors interstate commerce.

2. Whether, under the four-pronged analysis in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, __ U.S. __, 112 S.Ct. 2791 (1992), *General American* should be overruled.

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No. 93-397

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THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
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On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE

STATEMENT OF THE CASE

Preliminary Statement

For over twenty years since Missouri first adopted its City Sales Tax Law in 1969, out-of-state vendors have enjoyed a commercial advantage over Missouri businesses. The tax at issue in this case, Missouri's Additional Use Tax, has not changed that reality, but merely reduced the *dis*advantage Missouri businesses continue to suffer.

Missouri's state-wide sales tax rate is 4.225%. §144.020.1(1); Mo. Const. art. IV, §§43(a) and 47(a).[1] In recognition of local revenue needs, cities and counties within Missouri are authorized, upon voter approval, to impose additional local sales taxes for various local purposes.[2] Virtually every local jurisdiction has imposed local sales taxes. (S.L.F. 11-37). Because needs vary by locality, the local tax is permissive, and the rate may vary within the statutory parameters.

Sales within localities are therefore taxed at the combined state and applicable local rate. As of 1992, the aggregate state and local sales tax rate in some localities was as high as 7.725%. (JA 67).[3] Based on evidence before the trial court,[4] the average local sales tax rate exceeded 1.8%.[5] On a statewide average,

[1] All statutory references are to RSMo. (1986) unless otherwise specified.

[2] Those purposes include, but are not limited to, law enforcement, street improvement, transportation and public works. *See* §§ 66.600-66.635; 67.500-67.545; 92.400-92.420; 94.500-94.510; 94.577; 94.600-94.655; 94.700-94.745.

[3] The record is generally limited to 1990 sales figures and sales tax rates from 1991 (see L.F. 560-92) and 1992 (*see* S.L.F. 56-88, 180-200). As noted below, these are not static, but may change.

[4] *Associated Industries of Missouri v. Director of Revenue*, Slip Op., No. CV192-15CC (Circuit Court of Cole County, July 15, 1992). The trial court judgment is printed in the Petition for Writ of Certiorari at A35-40. All citations to that judgment will be in reference thereto.

[5] The trial court found that in 1990, total sales subject to Missouri sales taxes was $35,663,398,847.22. *Associated Industries*, Slip Op. at A38 n. 1. (*See also* JA 67). If the "1992 aggregate local sales tax rates are applied on a locale by locale basis to the sales in each locale, such would generate $645,869,767.55 in local sales taxes." *Id.* (The trial court found that changes in the rates from 1990 to 1992 were "minimal"). *Id.* Dividing the total local sales tax revenue ($645,869,767.55) by the total sales ($35,663,398,847.22) yields an average local sales tax rate of approximately 1.811%.

sales in Missouri were taxed at an aggregate sales tax rate in excess of 6% (4.225% plus 1.8%).[6]

Until 1990, Missouri's state-wide use tax rate was only 4.225%.[7] Thus, Missouri businesses suffered not only competitive disadvantage, but shouldered alone the cost of municipal benefits shared, but not recompensed, by out-of-state businesses.

In 1990, the Missouri legislature attempted to remedy this disparity by enacting §144.747. That statute authorized each political subdivision to levy a use tax equivalent to its local sales tax. Although signed into law, §144.747 was not implemented. Had it been, the average local use tax rate likely would have been at least 1.8%,[8] and the average aggregate use tax rate would have exceeded 6%.

This scheme of varying local use tax levies also would have forced out-of-state vendors subject to Missouri jurisdiction, who are required to collect the tax, to ascertain the applicable local use

[6] The trial court specifically found as a matter of fact that the local sales tax rates are not likely to decrease in future years. This finding has proven true. Indeed, Missouri sales tax rates have increased rather than decreased. Compare S.L.F. 11-37 with Missouri State Tax Reporter (CCH), ¶60-430 at 6167-193.

[7] Missouri's first "Compensating Use Tax Law" was enacted in 1959. Law of Mo. 1959, H.B. 35. The use tax is a tax upon the sales price of all products stored, used or consumed within Missouri. §144.610. The definition of "sales price" under the use tax law echoes the definition of "gross receipts" upon which levy is made under the sales tax law. *Compare* §144.010.1(3) and §144.605(8). Sales tax exemptions are explicitly made applicable to the use tax. §144.030.2 and §144.615(3). The use tax achieves fair apportionment by giving a credit for any sales tax paid to another state respecting the purchase. §144.615(5). *See D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31 (1988).

[8] Although the 1990 enactment did not require localities to levy a use tax, they had every incentive to do so for reasons including revenue production and competitive fairness to local businesses.

tax for each transaction. The administrative cost of such a task could well have exceeded the amount of the use tax itself, and would certainly have resulted in a significantly higher administrative burden than if the use tax rate was uniform. (L.F. 147-150). Moreover, a non-uniform use tax risked Commerce Clause criticism due to the purchaser's ability to purchase instate at a sales tax rate lower than the use tax rate at his place of residence. *See American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio 1978).

To overcome these substantial practical and legal problems, the Missouri legislature in 1991 repealed §144.747, and enacted a new use tax statute, effective July 1, 1992. That statute, §144.748, like its repealed predecessor, sought to lessen the competitive disadvantage to Missouri business, and to require interstate commerce to pay its just share of the tax burden. This time, however, the legislature took an approach which not only continued to recognize the importance of local needs, but gave more consideration to the practical needs of firms involved in interstate commerce.

Section 144.748 effectively sets a uniform, state-wide use tax of 5.725%. While the 1.5% increase from the pre-1990 4.225% rate places intrastate commerce on a more level playing field, the aggregate tax burden is still born disproportionately by Missouri businesses. Over ninety-two percent of all taxable transactions in this state carry a sales tax rate equal to or greater than 5.725%[9]. Thus, "intrastate sales in Missouri in calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales." *Associated Industries*, Slip Op. at A38-39 (emphasis original).

[9] The legislature considered this fact when it selected 1.5% as the additional statewide 1.5% use tax rate (L.F. 245-46).

Notwithstanding the continued favored status of interstate commerce, Petitioners challenge §144.748. Based upon factual hypothesis and legal mischaracterizations, Petitioners disparage a state tax system which operates to the net advantage of out-of-state sellers. Petitioners simply foreswear their responsibility to bear a just share of the municipal benefits they enjoy, and ask this Court to adopt a myopic rule of interstate burden heretofore unrecognized in Commerce Clause jurisprudence. According to Petitioners, §144.748 is unconstitutional if the sale tax rate in even one political subdivision is less than 1.5% regardless of the aggregate advantage to interstate commerce.

The Parties

Petitioner Associated Industries of Missouri ("AIM") is a not-for-profit "business league" comprised of individuals and enterprises engaged in business in Missouri. AIM's members pay Missouri sales and use taxes on purchases of tangible personal property made within and without the State of Missouri. (JA 33, ¶4). Certain unidentified members of AIM are multistate corporations whose principal operations or headquarters are located outside Missouri. (JA 32, ¶4).[10] "Several" of these members collect and remit Missouri use tax on sales made outside Missouri to purchasers within Missouri. (JA 33, ¶4).

Petitioner, Alumax Foils, Inc. ("Alumax") is headquartered in St. Louis, Missouri. (JA 33, ¶5). The combined local sales tax rate at that location is 1.5%. (S.L.F. 69). In connection with its

[10] The record does not indicate where in Missouri such sales are made, whether any AIM member competes with any vendor located in Missouri, or whether the particular situs from which competing goods, if any, are sold has a local tax rate of less than 1.5%. Nor is there any evidence identifying the location from which "multistate" AIM members do business in Missouri, or the sales tax rate applicable to sales made therefrom. The evidence does show, however, that over ninety percent of the sales in this state occur in locations where the sales tax rate is 5.725% or higher. Over half of Missouri sales will be taxed at a rate higher than 5.725%. *Associated Industries*, Slip Op. at A37.

business of manufacturing and selling foil products, Alumax purchases tangible personal property from sellers located both outside and within Missouri. As of June, 1992, Alumax paid approximately $3,000 per month in Missouri use tax. (JA 33, ¶5). Alumax states that its use tax liability is approximately $786 more per month by reason of the 1.5% increase in Missouri's use tax rate. Appellants' Brief, p. 5.[11]

According to the stipulation of facts, compliance with §144.748 will impose "significant economic costs" on AIM members and Alumax. These "costs" include "payment of the tax" and "administrative costs of compliance." (JA 34, ¶8). Assuming the former means payment born by Missouri purchasers like Alumax, there is no evidence that the amount paid in use tax under §144.748 is any greater than the amount that would be paid in sales tax if the purchase was made in Missouri. Assuming "payment" means collection of the use tax by AIM's multistate firms, there is no evidence of competitive disadvantage. Whatever is meant by "administrative costs of compliance", there is no evidence that any alternative to §144.748 would be less burdensome than a flat, state-side use tax rate. Indeed, the evidence is to the contrary. (L.F. 147-150).

Intervenors include the Missouri Association of Counties and the Missouri Municipal League (both organizations representing the interests of Missouri counties), the City of Blue Springs, Delong's Inc. (a steel fabricating company located in Jefferson City), Associated General Contractors of Missouri, and Gary

[11] The record contains no indication, however, that the amount of use tax paid by Alumax is any greater than the amount it would have to pay in sales tax had the purchases been made in Missouri. The record reveals that in June 1992, Alumax made a single purchase from a vendor located in St. Francois County on which Alumax paid sales tax at an aggregate rate of 4.975%. (L.F. 198-99). The record contains no indication as to the nature of the item purchased, or whether a comparable product was available from an out-of-state source.

Markenson (a taxpayer residing in Jefferson City). All intervenors have a direct economic interest in this case.

Proceedings Below

Seven months prior to the effective date of §144.748, AIM and Alumax filed their petition in the Circuit Court of Cole County, Missouri. The petition sought a declaration that §144.748 violates the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution and the Due Process, Equal Protection and Uniformity clauses of the Missouri Constitution, and in addition, injunctive relief from enforcement of the statute.

Petitioners did not argue below (nor do they argue here) that §144.748 places an undue burden on interstate commerce on a state-wide basis. Rather, their constitutional challenge relies on hypothetical transactions occurring within "certain" localities having a local sales tax rate of less than 1.5%.

The trial court found as a matter of fact that while some sales in Missouri may be subject to local sales tax of less than 1.5%, the evidence showed that as of 1990, intrastate sales in Missouri were "subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales." *Associated Industries*, Slip Op. at A38 n.1 (emphasis original). Further, the evidence established that "the overwhelmingly predominant local sales tax rates in Missouri will remain at 1.5% or higher for so long as Section 144.748 . . . remains in effect." *Id.* at A38. Based upon the evidence, and under the rationale of *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the trial court determined that §144.748 is "not discriminatory vis-a-vis local sales taxes and . . . does not constitute a burden upon interstate commerce." *Id.*

In a six to one decision, the Missouri Supreme Court affirmed. *Associated Industries of Missouri v. Director of Revenue*, 857

S.W.2d 182 (Mo. banc 1993). The Court found that where a permissive system of local sales taxes is allowed, dollar-for-dollar exactness is "most likely impossible". *Id.* at 192. It considered the same cases relied upon by Petitioners here, and found them distinguishable: "In each of these cases the taxes that were found unconstitutional imposed higher use taxes both on an individual basis and on an average statewide basis . . . Whether the discrimination against interstate commerce was small or large in dollar amount, it was mandated in every transaction and unmitigated by the structure of the tax." *Id.* at 191 (citing *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977)). In the present situation, the Court said, this is not so. *Id.* Rather, §144.748 "was calculated to produce a statewide result of a lesser burden on interstate commerce than exists for intrastate commerce." *Id.*

The Court not only found *Halliburton* and its progeny distinguishable, but looked to more recent pronouncements favoring substance over form. *Id.* (citing *Quill Corp. v. North Dakota*, ___U.S.___, 112 S. Ct. 1904 (1992); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991)). Thus, the Court concluded that the more appropriate analysis, as found in *General American*, seeks to determine whether a tax scheme burdens interstate commerce in practical, collective effect. Because the state-wide result of §144.748 is a lesser burden on interstate than intrastate commerce, it does not discriminate in purpose or practical effect. While in certain localities, the use tax may exceed the sales tax, the Commerce Clause protects "interstate commerce" and "does not require identical treatment of all taxpayers." *Associated Industries*, 857 S.W.2d at 192.

Petitioners sought, and were granted, certiorari on the Commerce Clause issue. Petitioners urge application of a standard

that would invalidate any tax allowing any possible "instance" of unequal burden and ask, *inter alia*, that this Court's decision in *General American* be declared consistent with that rule, or be overruled. Petition for Writ of Certiorari, pp. 13-16.

SUMMARY OF ARGUMENT

The dormant Commerce Clause prohibits "economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 800 (1992). *See also Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). To determine whether a state tax constitutes economic protectionism and therefore violates the Commerce Clause, the "state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981).

For over 100 years, this Court has recognized that a tax which burdens *inter*state commerce does not violate the Commerce Clause if it "compensates" for the burden that another substantially equivalent tax imposes on *intra*state commerce. *See, e.g., Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926); *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). Thus, "[t]he concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 242 (1987) (quoting *Maryland v. Louisiana*, 451 U.S. at 758 (1981)).

Here, that burden is easily identifiable. Through enactment of §144.748, Missouri properly attempted to compensate for the burden imposed upon intrastate commerce by varying local sales taxes. The record indicates that the average rate of those taxes exceeds 1.8%. The Additional Use Tax rate is 1.5% — more than

20% less than the average local sales tax rate. Because Missouri's Additional Use Tax thus *under*compensates for the burden imposed upon intrastate commerce by local sales taxes, it plainly does not violate the Commerce Clause.

On materially identical facts, this Court has so held. In *General American*, this Court ruled that a Louisiana tax imposed upon nonresident railroad companies, which was approximately equal to the "average" tax imposed upon resident railroad companies, did not violate the Commerce Clause. Louisiana permitted its local jurisdictions to impose varying local tax rates upon resident railroad companies to satisfy local needs. In some local communities, the aggregate local tax rate on resident companies was higher than the tax rate on nonresident companies; in other localities it was lower. On average, however, it was approximately equal. 270 U.S. at 371.

Justice Stone, writing for a unanimous Court, had little trouble reaching the unremarkable conclusion that the tax on nonresident companies did not violate the Commerce Clause. In language and rationale perfectly consistent with this Court's more recent Commerce Clause cases, Justice Stone wrote:

> "Where a taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." *Id.* at 373.

Based upon *General American* and more recent cases, the Missouri Supreme Court ruled that Missouri's sales-use tax structure "does not discriminate against interstate commerce in purpose or practical effect" because it "imposes a lesser tax burden on interstate commerce than it does on intrastate commerce." *Associated Industries*, 857 S.W.2d at 192. That sound

holding is fully consistent with the precedents of this Court, and should not be disturbed.

Far from burdening *inter*state commerce, the stipulated facts reveal that the combined effect of Missouri's aggregate sales and use taxes is a net burden on *intra*state commerce. For one year alone, the trial court found as a matter of fact that the net burden on intrastate commerce exceeded $100,000,000. *Associated Industries*, Slip Op. at A38 n.1. Thus, in-state sellers remain at a substantial competitive disadvantage to out-of-state sellers.

It is therefore absurd to suggest, as Petitioners have, that §144.748 is "patently protectionist." Petitioners' Brief, p.13.[12] Nor can it reasonably be said to "pass an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden interstate commerce." *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1913 (1992) (interpreting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)) (emphasis added). Under this Court's teachings, Missouri's sales-use tax system does not come close to violating the Commerce Clause.

Acknowledging, as they must, that Missouri's sales-use tax structure overall is substantially pro-interstate commerce, Petitioners and their Amicus advocate adoption of a heretofore unrecognized requirement that there not be one possible "instance" in which an interstate firm is burdened more than an intrastate firm.[13] Not only is such a requirement flatly inconsis-

[12] Justice Cardozo, considering a similar claim in *Silas Mason*, warned about such conclusory labels: "Catch words and labels, such as the words 'protective tariff,' are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Silas Mason*, 300 U.S. at 586.

[13] Indeed, Petitioners' Amicus twice baldly states that any state tax that fails to provide equal treatment to interstate and intrastate commerce in "each and every instance" violates the Commerce Clause. *See* Br. *Am. Cur.* of Washington Legal Foundation pp. 4, 9. Not surprisingly, neither statement contains a single supporting citation.

tent with *General American* and more recent precedents,[14] it reflects a fundamental misunderstanding of the purpose of the Commerce Clause. As this Court recently observed, that Clause addresses "structural concerns about the effects of state regulation on the *national economy*." *Quill*, 112 S.Ct. at 1913 (emphasis added). It "protects the interstate market, not particular interstate firms." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978)).[15]

Here, the record establishes that Missouri's sales-use tax statutes benefit the "national economy" and the "interstate market" at the expense of intrastate commerce. This Court has never invalidated a state tax structure having that practical effect. It should not do so now.[16]

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[14] *See, e.g., Dunbar-Stanley*, 393 U.S. at 542 (rejecting a Commerce Clause challenge to a complementary state taxing structure which allowed for "instances" of unequal burden, but which overall did not "bear unfairly" upon interstate commerce).

[15] That is not to say, of course, that individual interstate firms do not have a *remedy* for a Commerce Clause violation. *See Dennis v. Higgins*, 498 U.S. 439 (1991).

[16] Moreover, Petitioners' flawed micro-approach fails to account for the competitive *advantage* that individual interstate firms have over local firms in jurisdictions in which the majority of taxable sales occur. To use Petitioners' example, any supposed disadvantage a Kentucky firm would have selling to a resident of Dunklin County, Missouri, where the sales tax rate is 4.225%, would be more than offset by the *advantage* to that same Kentucky firm in selling to residents of other localities where the sales tax rates all are above 5.725%. (*See* S.L.F. 11-37). Over 92% of Missouri sales take place in jurisdictions which have a sales tax rate of 5.725% or greater. Moreover, interstate firms enjoy a net $100 million competitive advantage over intrastate firms. Given this enormous collective advantage, it is doubtful whether *any* individual interstate firm is at a net competitive disadvantage when seeking to make sales in Missouri. Petitioners certainly have not shown that any are. Thus, if the Commerce Clause required the type of individual-

(Footnote 16 continued on next page)

The fact that Missouri's sales-use tax system produces a net advantage to interstate commerce distinguishes the cases relied upon by Petitioners. In each case, the challenged state tax or regulation burdened interstate firms both individually and *as a class*. There was no corresponding benefit that outweighed the burden — either to an individual firm or to the interstate market overall. For this reason, it is hardly surprising that those cases found the challenged statute to be protectionist, and therefore violative of the Commerce Clause. Precisely the opposite situation is presented here, where intrastate firms are far more heavily burdened than interstate firms.[17]

Contrary to Petitioners' and their Amicus' characterizations, neither Respondents nor the courts below advocate adoption of a *de minimis* exception to the Commerce Clause. As both courts below expressly found, there simply is *no* discrimination pre-

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(Footnote 16 continued)

ized firm-by-firm analysis Petitioners suggest (it plainly does not), Petitioners have failed to prove any violation. *See Dunbar-Stanley*, 393 U.S. 537 (record insufficient to establish actual injury). Moreover, Petitioners have failed to show that they themselves have suffered any net injury-in-fact as a result of any supposed unconstitutionality in Missouri's sales-use tax system. They thus lack standing. *See* Br. *Am. Cur.* of The National Conference of State Legislatures *et al.*, Part I. To avoid duplication, Respondent will not repeat its Amicus' reasoned argument that Petitioners lack standing, but adopts that argument by this reference.

[17] Relying, with a single exception, upon cases that did not involve sales and use taxes, Petitioners also imply that Missouri's use tax somehow is not "complementary" to the sales tax because it taxes "different events or transactions." Petitioner's Brief, p. 24. Not even Petitioners' Amicus buys that argument. *See* Br. *Am. Cur.* of Washington Legal Foundation, p. 5. Indeed, after *Silas Mason*, no court has questioned that unassailable holding that sales and use taxes like those at issue here do in fact apply to substantially equivalent events and transactions. One respected commentator has called sales and use taxes the "paradigm" of complementary taxes. Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 406 (Spring 1986).

sented here, *de minimis* or otherwise.[18] Nor does Respondent here attempt to "justify" the additional use tax on "administrative convenience" grounds.[19] Advancement of a legitimate state purpose to "justify" a scheme of taxation presupposes that the scheme discriminates. *Cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). Because Missouri's Additional Use Tax does not in purpose or in practical effect discriminate against interstate commerce, the State need not "justify" it.[20]

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[18] *Associated Industries*, 857 S.W.2d at 192 ("We find that the tax scheme in the present case does not discriminate against interstate commerce in purpose or in practical effect"); *Associated Industries*, Slip Op. at A38-39 ("The Court therefore specifically finds that the Additional Use Tax is not discriminatory vis-a-vis local sales taxes and that the Additional Use Tax does not constitute a burden upon interstate commerce").

[19] Respondent does not, however, concede that administrative convenience to the State is unworthy as a justification were one necessary. Petitioners suggest that administrative convenience is never an acceptable reason for validating an otherwise discriminatory tax. Petitioners' Brief, pp. 28-29. For this proposition, Petitioners cite *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) and *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___U.S.___, 112 S. Ct. 2365 (1992). Contrary to Petitioners' characterization, those cases hold only that legitimate state goals will not justify a discriminatory statute if there are available nondiscriminatory alternatives to achieve the same result. *Halliburton*, 373 U.S. at 74 n. 9; *Kraft*, 112 S. Ct. at 2371. *See also New Energy*, 486 U.S. at 278. Other cases directly approve administrative convenience as a basis to validate an otherwise discriminatory tax. *See, e.g., Goldberg v. Sweet*, 488 U.S. 252, 264-65 (1989). At a minimum, a state is not required to avoid taxes which do not produce exact parity in every instance when the tax is the "only practicable means of collecting revenues. . .and the [alternatives] would pose genuine administrative burdens." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 296 (1987). Such administrative burdens can include cost to the state, and cost to the taxpayer. *Id.* at 296 n. 26. *Kraft* itself acknowledges administrative convenience as a legitimate state interest. 112 S. Ct. at 2371.

[20] If a justification were necessary, it exists here. *See infra*, pp. 28-31.

Finally, Petitioners have offered nothing to warrant overruling *General American*. Its holding is entirely consistent with this Court's past and present approach of weighing the competing burdens to interstate and intrastate commerce of complementary state taxes. It provides a useful, workable, bright-line test that has withstood the test of time, and upon which states have relied in devising their tax systems. Thus, under the four-factor test set forth in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791 (1992), *General American* should not be overruled.

ARGUMENT

I. MISSOURI'S SALES-USE TAX SYSTEM FAVORS INTERSTATE COMMERCE, IS NOT PROTECTIONIST AND THEREFORE CANNOT BE VIOLATIVE OF THE COMMERCE CLAUSE.

A. The Dormant Commerce Clause Prohibits Only Economic Protectionism.

The Commerce Clause by its terms grants to Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, §8, cl.3. This Court long ago determined, however, that the Commerce Clause "is more than an affirmative grant of power; it has a negative sweep as well." *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1911 (1992) (citing *Gibbons v. Ogden*, 9 Wheat. 1, 231-232 (1824) (Johnson, J. concurring)). This Court has interpreted the "negative" or "dormant" Commerce Clause to prohibit "state regulations that unduly burden interstate commerce." *Id.* at 1913.

That rule is grounded in the underlying purpose of the dormant Commerce Clause, which this Court has defined as prohibiting "economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 800 (1992). *See also Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) ("The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism ..."). Thus, this Court consistently has invalidated state statutes that constitute "pure isolationism" (*Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992)) and "simple economic protectionism" (*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263

(1984)).[21] By contrast, the Court has been equally consistent in upholding state statutes that do not run afoul of this fundamental purpose of the clause. *See* cases discussed *infra*, pp. 18-27.

What constitutes "economic protectionism" in the realm of state taxation has perplexed both this Court and commentators for more than a century.[22] Under the Court's current approach, states are now plainly permitted to require that interstate commerce pay "its *fair* share of state taxes." *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 31 (1988) (emphasis added). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their *just* share of [the] state tax burden even though it increases the cost of doing business") (internal quotation and citation omitted) (emphasis added).

Conversely, "taxes that pass an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden interstate

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[21] As one respected commentator colorfully put it, "[i]f the Court gets the aroma — real or imagined — of economic protectionism, likely the Commerce Clause will spell downfall for the tax." Hartman, *Federal Limitations on State and Local Taxation*, §2:19 at 157 (1992 Supp.).

[22] In *Quill*, this Court recently observed after a historical analysis that "our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." 112 S.Ct. at 1915 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959)). For these reasons, "constitutional scholars have all but abandoned the state tax field" and constitutional law professors have dropped the subject of state taxation from their casebooks. Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 405 (Spring 1986). *See also* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 426 n.2 (1982) ("No attempt is made here to synthesize the equally confusing and often more complex problem of dormant commerce clause limitations on state taxation").

commerce" are protectionist and are therefore prohibited. *Quill*, 112 S.Ct. at 1913 (interpreting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)) (emphasis added). As discussed below, Missouri's sales-use tax system plainly does not violate that standard, is not protectionist, and therefore does not violate the Commerce Clause.

B. This Court Has Consistently Ruled That "Compensatory" or "Complementary" Taxes, Which Do Not Overcompensate for the Burden Imposed on Intrastate Commerce By Local Taxes, Do Not Constitute Economic Protectionism.

These concepts of fairness, justness and undue burden take on special significance in the area of "compensating" or "complementary" taxes. For over 100 years, this Court has recognized that certain state taxes, when viewed in isolation would pass an unfair share of the tax burden onto *inter*state commerce, do not violate the Commerce Clause when viewed in conjunction with other substantially equivalent taxes which burden *intra*state commerce.

For example, at issue in *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869), was an Alabama tax of fifty cents per gallon upon spirituous liquor dealers "introducing any such liquors into the State for sale." *Id.* at 148. The Court observed that "[i]f this section stood alone in the legislation of Alabama on the subject of taxing liquors," it would violate the Commerce Clause. *Id.* at 150, 152. The Court recognized, however, that the section did not stand alone. Other sections imposed a tax of fifty cents per gallon upon whiskey and brandy from fruits manufactured in the state. The Court thus reasonably found that the interstate tax did not violate the Commerce Clause because it was "complementary" to the intrastate tax. *Id.* at 153. *Accord Maryland v. Louisiana*, 451 U.S. 725, 756 (1981).

Hinson and similar later cases[23] served as the doctrinal underpinning to this Court's 1926 decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), a case that presents a materially identical fact situation to the one here. In *General American*, nonresident railroad companies were assessed a Louisiana tax equal to 25 mills per dollar of the assessed value of rolling stock operated over any railroad in the state. Resident railroad companies were subject to varying local taxes imposed by Louisiana parishes and municipalities. Some local taxes exceeded 25 mills per dollar; other local taxes were less than 25 mills per dollar.

The lower court found the "average" of the local taxes was "approximately 25 mills." *Id.* at 373. The taxpayers, nonresident railroad companies, argued that the 25 mill per dollar tax imposed upon them but not upon resident railroad companies violated both the Commerce Clause and the Equal Protection Clause.[24]

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[23] See, *e.g.*, *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902).

[24] The taxpayers also argued that the local tax rate was 21 mills rather than the 25 mills found by the trial court, and contended that the 4 mill disparity constituted discrimination. *Id.* This Court found, however, that the "record ... [did] not support appellants' contention." *Id.* at 374. The Court concluded that "appellant has therefore failed to show that the tax is discriminatory, either in principle or in its practical operation, and has laid no foundation for assailing its constitutionality." *Id.* at 375. In their brief, Petitioners claim this latter statement was the Court's holding, and that everything else in the case was "dicta". Petitioners' Brief, p. 30 n. 17. That is simply incorrect. The failure of proof in *General American* related solely to the taxpayers' failure to demonstrate that the lower court's finding of an average 25 mill tax rate was clearly erroneous. The Court's holding was that the average 25 mill tax rate for local businesses was approximately equal to the 25 mill rate imposed upon nonresidents, and therefore, no discriminatory purpose being shown, the tax did not violate the Commerce Clause. That holding is directly applicable here.

In a unanimous opinion written by Justice Stone, the Court rejected the taxpayers' argument and upheld the tax. Consistent both with *Hinson* and recent cases, the Court focused upon the combined practical effect of the challenged tax on nonresident companies and the varying local taxes on resident companies. The Court observed that it was "obvious" that the tax on nonresident companies was simply "in lieu of" the local taxes assessed against resident companies. *Id.* at 372. Because the two taxes were "substantially the equivalent," "there was no *unjust* discrimination" against interstate commerce. *Id.* at 373.

In language equally applicable here, the Court characterized its ultimate holding under the Commerce Clause as:

> "Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." *Id.* at 373.[25]

General American is dispositive in this case. Its facts are virtually identical to those presented here, and its legal analysis

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[25] The Court then went on to analyze and summarily reject the taxpayers' equal protection argument. *Id.* at 373. Petitioners' argument that *General American* is not applicable because "it was primarily an equal protection, not a Commerce Clause, case" is simply wrong. *See* Petitioner's Brief, p. 13. The analysis set forth above (which is dispositive here) is entirely from the Commerce Clause portion of the opinion. It would come as a surprise to Professors Hartman and Hellerstein, perhaps the two most respected scholars in this area, to learn that *General American* was primarily an equal protection case; both cited and discussed it in their analyses of Commerce Clause limitations on state taxation. Hartman, §2:19 at 128; Hellerstein, 39 Tax Lawyer at 410-11. Equally surprised would be Justice Cardozo, who discussed *General American* approvingly in his analysis of the Commerce Clause in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937).

is fully consistent with this Court's current approach in compensatory tax cases. Indeed, the only conceivable distinction between *General American* and this case is the different nature of the taxes.

Any significance of that distinction, however, was put to rest by this Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). In that case, the Court expressly utilized and relied upon the principles established in *General American* and *Hinson* in applying the compensatory tax doctrine to sales and use taxes.[26]

At issue in *Silas Mason* was a Washington statute imposing a two percent tax on the use of chattels in that state. Another statute imposed a two percent tax on every retail sale in the state. Washington exempted from its use tax items that had already been subjected to a sales tax rate of two percent or greater. If the sales tax rate was less than two percent, the result of the exemption was that the use tax applied to the difference. *Id.* at 580-81[27]. Certain taxpayers, who brought into the state chattels

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[26] Contemporary scholars likewise have recognized there is no material analytical distinction between "in lieu" taxes, like the one in *General American*, and other types of complementary taxes like sales and use taxes. *See, e.g.*, Hellerstein, 39 Tax Lawyer at 420 (1986). Thus, it is not surprising that this Court's analysis of "in lieu" cases has been virtually identical to its analysis of other complementary taxes. *See, e.g., Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 698 (1895) ("In lieu" taxes will be sustained if they are the "just equivalent" of the taxes in lieu of which they are imposed). Professor Hellerstein observed that the *Postal Telegraph* holding "has been a cornerstone of constitutional doctrine ever since." Hellerstein, 39 Tax Lawyer at 421. *General American*, of course, further refined the "just equivalent" principle to a bright-line rule that if the "average" tax on intrastate commerce is higher than the corresponding tax on interstate commerce and no discriminatory purpose is shown, the latter tax does not violate the Commerce Clause.

[27] Petitioners' footnote reference to a supposed constitutional defect in Missouri's use tax credit, which has the same practical effect as the use tax

(Footnote 27 continued on next page)

for use in constructing the Grand Coulee Dam, challenged the use tax on Commerce Clause grounds.

Justice Cardozo, writing for a unanimous Court, began his analysis by examining the "practical effect" of sales-use tax:

> "One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales." *Id.* at 581.

He then characterized the question presented as:

> "Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?" *Id.*[28]

Justice Cardozo first easily disposed of the taxpayers' argument that the sales tax could not be considered because it was not in the same statute as the use tax, stating that:

> "There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power." *Id.* at 584 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932)).

He next examined the Court's prior cases which had held that burdens imposed by one state tax upon interstate commerce could be properly offset by burdens imposed upon intrastate commerce by other state taxes. Those cases, which included *Hinson* and *General American*, all supported the conclusion, Justice Cardozo opined, that use taxes are "complementary" and therefore not violative of the Commerce Clause. *Id.* at 585.[29]

(Footnote 27 continued)

exemption in *Silas Mason*, is puzzling, to say the least. Petitioners' Brief, p. 21 n. 12. Indeed, the Court in *Silas Mason* specifically observed that the essential effect of the exemption was that "[a] use tax is never payable where the user has acquired property by retail purchase in the state of Washington." 300 U.S. at 581. That is precisely the effect of Missouri's use tax credit. Moreover, as the Court in *Silas Mason* expressly noted, states are not constitutionally mandated to give credit for sales tax paid to another. *Id.* at 587. *See also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76-77 (1963)(Brennan, J., concurring); *Williams v. Vermont*, 472 U.S. 14, 21-22 (1985). That Missouri *does* credit sales tax paid to another state simply means that Missouri goes further to accommodate interstate commerce than is constitutionally required. In any event, Petitioners in the proceedings below did not challenge that credit, or any other provision of Missouri's underlying use tax law. They therefore may not do so now. *See* U.S. Supreme Court Rule 14.1(a); *Bacchus*, 468 U.S. at 267 n. 7.

[28] Under this Court's current Commerce Clause analysis, the first question — whether the tax constitutes a tax upon interstate commerce — is no longer relevant. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977) (overruling *Spector Motor Service, Inc. v. O'Conner*, 340 U.S. 602 (1951)). The other question articulated by Justice Cardozo — whether the taxing scheme in "practical effect" constituted an undue burden on interstate commerce — is identical to this Court's current methodology. *See, e.g., Quill*, 112 S.Ct. at 1913 (The Commerce Clause prohibits taxes that "pass an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden interstate commerce")(emphasis added); *Complete Auto*, 430 U.S. at 279 (Admonishing that courts must consider "not the formal language of the tax statute but rather its practical effect" in considering Commerce Clause issues).

[29] Justice Cardozo obviously did not view *General American* as inconsistent with *Silas Mason*: he incorporated *General American* in his analysis. Therefore, his observation that "[e]quality is the theme that runs through all the sections of the statute", 300 U.S. at 583, cannot reasonably be read, as Petitioners suggest, to mean that there cannot be a single possible "instance"

(Footnote 29 continued on next page)

Justice Cardozo then considered the taxpayers' attempt to "stigmatize" the use tax as a "protectionist tariff." *Id.* at 586. That argument is identical to Petitioners' attempt to stigmatize §144.748 as "patently protectionist". *See* Petitioners' Brief p. 13. After reaching the "common sense conclusion" that it was not, *id.* at 584, Justice Cardozo warned future courts not to be misled by the use of such conclusory labels:

> "Catch words and labels, such as the words 'protective tariff,' are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Id.* at 586.

Finally, Justice Cardozo recognized, in language equally pertinent here, that federal courts should allow the states considerable latitude to develop taxing statutes that best meets their needs:

> "To contend [that the tax is unconstitutional] would be to deny that a state may develop its scheme of taxation in such a way as to rid its exactions of unnecessary oppression . . . A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. . . A legislature has a wide range of choice in classifying and limiting the subjects of taxation." *Id.* at 586-87.

(Footnote 29 continued)

of discrimination. As pointed out above, the taxing scheme in *General American* allowed for possible "instances" of discrimination in localities where the "in lieu" tax was greater than the local property tax. *See also Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969) (similarly upholding a complementary tax scheme which allowed for possible instances of discrimination). *General American* nonetheless upheld the tax because the "average" local property tax was approximately equal to the "in lieu" tax. Here the "average" local sales tax is 20% *less* than the local use tax; *a fortiori*, Missouri's sales-use tax statutes do not violate the Commerce Clause.

Silas Mason thus stands for the proposition that use taxes are "compensatory" or "complementary" to sales taxes in the same manner that the "in lieu" taxes in *Hinson* and *General American* were complementary to property taxes. Indeed, because a use tax reaches virtually identical events, and certain types of "in lieu" taxes may not (as this Court's later precedents make clear), the use tax perhaps is a better example of a classic "compensatory" tax than is the "in lieu" tax.

The *General American/Silas Mason* approach has not become outdated, as Petitioners claim, but is reflected in this Court's more recent compensatory tax cases. For example, in *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), this Court considered a Commerce Clause challenge by a North Carolina photography firm to an Alabama tax on "transient or traveling photographer(s)." The tax was $5 per week for each county, town, or city in which the photographer conducted business. *Id.* at 538. By contrast, for photographers who conducted their business "at a fixed location," Alabama imposed taxes which varied in different localities across the state. Those taxes ranged from $3 to $25 per location per year, depending on the size of the city. *Id.* at 538 n. 2.

Thus, as in *General American* (and this case), there were "instances" in which out-of-state businesses would be taxed at a higher rate than in-state businesses.[30] Indeed, in certain areas in the state, an out-of-state photographer would pay a greater tax than an in-state single location photographer in *every* instance. In other areas of the state, the out-of-state photographer would pay a greater tax if he conducted business in Alabama more than a certain number of weeks.

This Court nonetheless upheld the tax. It held that "[o]n the record before us, there is no basis for concluding that the $5 per

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[30] By definition, "fixed location" businesses were in-state while out-of-state businesses would always be "transient".

week tax on transient out-of-state photographers is *so disproportionate* to the tax imposed on photographers with a fixed location as to bear *unfairly* on the former." *Id.* at 542 (emphasis added).[31]

Dunbar-Stanley thus is perfectly consistent with *General American* and *Silas Mason*, and with this Court's more recent decisions in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) and *Quill*, 112 S.Ct. 1904. The Court considered the relative burdens on interstate and intrastate commerce imposed by two distinct taxes, and concluded that the tax on interstate commerce did not *over*compensate for the burden imposed upon intrastate commerce by the local tax. To use *Quill's* phraseology, the Court ruled that the tax did not pass an "unfair" share of the tax burden onto interstate commerce and thus did not "unduly burden" interstate commerce. *Quill*, 112 S.Ct. at 1913.

These cases demonstrate that Petitioners' novel legal theory is inconsistent with this Court's precedents. As pointed out above, the tax schemes in *Dunbar-Stanley* and *General American* allowed for possible "instances" of discrimination, but this Court nonetheless upheld the taxes because *overall*, they did not unfairly burden interstate commerce. Those cases are directly applicable here.

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[31] To be sure, part of the Court's decision in *Dunbar-Stanley* was based upon the taxpayer's failure to show that its photographers necessarily had been required to pay more than local photographers in the towns in which its photographers had conducted business. That same failure of proof, however, is equally present here. Petitioners have not shown, nor have they attempted to show, that out-of-state sellers, either individually or as a class, have suffered a net burden compared to in-state sellers. Thus, under *Dunbar-Stanley*, Petitioners' failure of proof alone is sufficient to uphold the lower court's decision. *Accord Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251 (1928) ("To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it").

C. Missouri's Additional Use Tax Is A "Compensatory" Tax, Does Not Overcompensate For The Burden Upon Intrastate Commerce Caused By Missouri's Varying Local Sales Taxes, Is Not Protectionist And Therefore Does Not Violate The Commerce Clause.

Since the Court's 1937 decision in *Silas Mason*, the proposition that sales and use taxes are "compensatory" has been firmly established.[32] Because sales and use taxes, perhaps more than any other type of compensatory taxes, apply on "substantially equivalent events," they have become known as the "paradigm" of compensatory taxes. Hellerstein, 39 Tax Lawyer at 406. No one can reasonably question that Missouri's sales and use taxes apply to "substantially equivalent events." *See supra*, n. 7.

A determination that two different taxes reach substantially equivalent events, however, does not end the analysis. Rather, as this Court's cases from *Hinson* to *General American* to *Silas Mason* to *Dunbar-Stanley* to *Tyler Pipe* have made clear, "[t]he concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Tyler Pipe*, 483 U.S. at 242.

Here, there is no reasonable question that in enacting the Additional Use Tax, Missouri was attempting to compensate for the burden imposed upon intrastate commerce by varying local sales taxes. The legislature was aware that those rates varied from 3.5% to 0%, and that the average local sales tax rate

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[32] Indeed, the *only* case in which this Court has invalidated a sales-use tax scheme involved a scheme that was plainly protectionist. *Halliburton*, 373 U.S. 64. In *Halliburton*, the sales tax base was more narrow than the use tax base, thus resulting in across-the-board discrimination against out-of-state sellers in every case. As pointed out above, that situation does not exist here; Missouri's sales and use tax bases are the same. *See* §§144.010.1(3) and 144.605(8).

exceeded 1.8%. Its decision to impose a 1.5% use tax rate, some twenty percent *less* than the average local sales tax rate, therefore *under*compensated for the burden imposed upon intrastate commerce by those local sales taxes. For one year alone, the trial court found the net burden to *intra*state commerce resulting from that undercompensation was $100,000,000. In these circumstances, the Additional Use Tax does not come close to violating the Commerce Clause.

Far from being "patently protectionist," as Petitioners claim, §144.748 represents a legitimate — and conservative — attempt to require those involved in interstate commerce to pay their "just share" of the state tax burden. *Commonwealth Edison*, 453 U.S. at 623-24. Missouri erred on the side of favoring *inter*state commerce, not *intra*state commerce. This Court has never invalidated a state tax with such a decidedly pro-interstate commerce tilt. It should not begin now.

D. No "Better" Alternatives Have Been Suggested.

Because §144.748 does not discriminate against interstate commerce, the state has no burden to "justify" that statute by showing it could not have accomplished its goals by less discriminatory alternatives.[33] In any event, no better alternatives have been suggested.

The administrative inconvenience to out-of-state sellers imposed by one of Petitioners' suggested alternatives — varying local use tax rates — itself would substantially burden interstate

[33] *Cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)("Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives").

commerce far more than the present system.[34] In fact, this Court recently made that very point. In *Quill*, the Court noted that varying local tax rates in over 6000 local taxing jurisdictions would subject interstate sellers to "many variations in rates of tax, . . . allowable exemptions, and . . . administrative and record-keeping requirements [which] could entangle [them] in a virtual welter of complicated obligations." 112 S.Ct. at 1913 n. 6. (quoting *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753, 759-760 (1967)). The Court flatly stated this cumbersome process imposed by such "a state tax might unduly burden interstate commerce."[35]

The varying local rates "solution" also would result in a substantial increase in the burden on interstate commerce in "dollars and cents." *See Halliburton*, 373 U.S. at 70. The average local sales tax rate exceeds 1.8%. The "local" component of Missouri's use tax is 1.5%. Mandating "equal" rates in each jurisdiction would therefore result in an effective increase in the local use tax rate of over 20%. It is difficult to conceive how raising the average use tax, which standing alone burdens

[34] If Missouri mandated by statute that each local jurisdiction adopt a local use tax equal to its local sales tax, interstate sellers with a substantial nexus to Missouri, who under *Quill* are required to collect the tax, would be faced with the prospect of determining for *each* purchaser the aggregate use tax in effect in the particular local jurisdiction in which the purchaser first exercises the privilege of "storing, using or consuming" the purchased item. For some purchases, that may occur in the jurisdiction of the purchaser's residence; in other situations it may not. For interstate sellers with multi-state operations, the task of determining both the applicable jurisdiction and the aggregate use tax rate currently in effect in that jurisdiction would be burdensome. (*See* L.F. 147-50).

[35] By contrast, a uniform use tax avoids the problem and results in less administrative cost to the out-of-state seller. (*See* L.F. 147-50, Affidavit of F. Joe DeLong: "A state wide uniform rate for use taxes for local purposes creates much lesser administrative burdens and costs where there are varying local use taxes").

interstate commerce, would somehow be more constitutionally permissible than keeping the use tax rate where it is.[36]

The other "solution" suggested by Petitioners is to outlaw constitutionally local sales and use taxes altogether, and mandate that the state-wide sales tax be identical to the state-wide use tax. To be sure, that approach may well eliminate Commerce Clause concerns, but would do so by federal court usurpation over the states' traditional power to allocate tax burdens within their borders to accommodate local needs. Just this term, the Court reaffirmed that "[p]rinciples of federalism support, in fact compel, our view ... [that] limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty" must be considered with hesitation. *Oregon Revenue Dep't v. ACF Industries, Inc.*, No. 92-74 Slip Op., at 11 (January 24, 1994).[37]

A third supposed "solution" would eliminate Missouri's ability to impose a local use tax greater than the lowest local sales tax rate. That approach would not only create the same problems mentioned above with respect to varying local use tax rates, but would also be flatly inconsistent with this Court's holdings

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[36] As noted by the Court below, the local varying rate approach raises additional Commerce Clause concerns as well. *See Associated Industries*, 857 S.W.2d at 192 (citing *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio 1978)).

[37] *See also San Antonio Independent School Dis't v. Rodriguez*, 411 U.S. 1, 40 (1973):

> "We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures."

Accord Silas Mason, 300 U.S. at 527-29. *Cf. Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279-280 (1978).

which expressly permit states to tax their fair share of interstate commerce. *See D. H. Holmes*, 486 U.S. at 31. It would also impose upon localities an obligation to set their local sales tax rates at a more burdensome level to make up for the lost use tax revenues. Thus, the competitive disadvantage in-state firms now suffer would be increased.

In short, no suggested solution is "better" than Missouri's current system. Thus, assuming *arguendo* Missouri is required to "justify" its sales-tax structure by showing that it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," that test is more than met here.

II. PETITIONERS' CASES ARE FACTUALLY INAPPOSITE, DO NOT UNDERMINE GENERAL AMERICAN, AND SUPPORT AFFIRMANCE HERE.

Petitioners contend that the Commerce Clause requires invalidation of any state tax system which could possibly produce one "instance" of competitive advantage for an in-state business, regardless of whether its overall effect is beneficial to interstate commerce. Yet, no case cited by Petitioners supports that far-reaching proposition. In fact, all of Petitioners' cases implicitly reject that approach, and are consistent with the approach of *General American* and the courts below.

The only sales-use tax case relied upon by Petitioners is *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). In *Halliburton*, the Louisiana sales and use tax rates were identical but applied to differing tax bases. It was *admitted* that the differing tax bases resulted in a net burden to out-of-state businesses. *Id.* at 66, 70. The lower court instead upheld the tax by characterizing the amount of discrimination as "incidental".

Id. at 70.[38] In rejecting Louisiana's proposed "incidental" burden exception to the Commerce Clause, the Court stated that:

> ". . . equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Id.* at 70.[39]

Unlike in *General American* and this case, the in-state sellers in *Halliburton* were *always* favored as a result of the differing tax bases. Conversely, out-of-state sellers were *always* at a competitive disadvantage. The economic result was therefore obvious — it was a mathematical certainty that, in "dollars and cents", interstate commerce would be negatively affected. That was true in every individual case, and on an overall basis.

Contrary to Petitioners' suggestion, *Halliburton* does not stand for the proposition that component parts of a complementary sales-use tax system are to be isolated and treated separately for purposes of Commerce Clause analysis. Rather, *Halliburton* reaffirmed the principles established in *Hinson*, *General American*, *Silas Mason* and *Dunbar-Stanley* that the "proper analysis must take '*the whole scheme of taxation into account*'."[40] *Id.* at 69 (emphasis added). Thus, far from undermining *General*

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[38] After assessing the dollar discrepancy, this Court found that the "resulting tax inequality is clearly substantial". *Id.* at 71. By contrast, out-of-state businesses in Missouri have an overall advantage. Thus, the advisability of an "incidental" or *de minimus* exception to the Commerce Clause is not presented here.

[39] This Court later characterized *Halliburton* as holding that the use tax base cannot be broader than the sales tax base. *Williams v. Vermont*, 472 U.S. 14, 23 (1985). In Missouri, it is not. *Compare* §144.010.1(3) and §144.605(8).

[40] By contrast, Petitioners' analysis takes into account *only* the localities of Missouri in which Missouri's aggregate use tax rate exceeds the aggregate sales tax rate. It ignores the economic advantage which non-Missouri businesses enjoy within the Missouri marketplace where the aggregate sales tax rate exceeds the aggregate use tax rate. Thus, Petitioners' approach is inconsistent with *Halliburton*, the primary case upon which they rely.

American, *Halliburton* supports Justice Stone's rationale and holding.

Another case relied upon by Petitioners, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), addressed a Pennsylvania marker fee tax and an axle tax on each motor carrier vehicle operating on Pennsylvania highways. The taxes were assessed at a flat dollar amount and, therefore, did not vary with the number of miles in which a particular vehicle traveled on the Pennsylvania highways during the year. The evidence showed that "[o]n the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." *Id.* at 276. The Court found that "[i]n practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." *Id.* at 286.

Scheiner does not support overruling *General American* as Petitioners suggest. To the contrary, it approves an analysis which focuses upon the "average" tax burden imposed on interstate and intrastate commerce. Indeed, the average tax imposed on interstate commerce was the controlling factor in both cases. The material distinction between them is that in *Scheiner*, the scale discriminatorily tipped against interstate commerce whereas in *General American*, it did not. *Scheiner's* rationale is thus consistent with that of *General American* and the decision below.

Another case relied upon by Petitioners, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), is far afield from the situation presented here and in *General American*. Indeed, *Bacchus* is not a compensatory tax case at all. In *Bacchus*, Hawaii imposed a 20% excise tax on sales of liquor at wholesale. To stimulate and encourage production of certain brandy and pineapple wine

manufactured locally, those items were exempted from the tax. The Court found that the exemptions had both a discriminatory purpose and discriminatory effect, and therefore constituted "'economic protectionism' in every sense of the phrase." *Id.* at 272. The state did not dispute the protectionist nature of the exemptions. *Id.* at 271. Rather, it argued for a "*de minimis*" exception to the Commerce Clause. *Id.* at 268-69. As in *Halliburton*, that argument was rejected. *Id.* at 269.

In contrast to *General American* and this case, the exemptions in *Bacchus* were not part of a compensatory system of taxation and had only one effect — to provide an economic advantage to sellers of local products. The exemptions *always* placed sellers of other comparable products at a competitive disadvantage. That case therefore provides little guidance here.

Maryland v. Louisiana, 451 U.S. 725 (1981), addressed a Louisiana "first use" tax on oil and gas piped into Louisiana from the Outer Continental Shelf (OCS). Exemptions from the tax applied where the OCS gas was used in certain commercial operations located in Louisiana. In addition, a credit applied against the tax for any Louisiana severance tax imposed on the extraction of oil and gas from Louisiana soil.

The Special Master recognized that by design and effect, the "first use" tax favored local interests. Nevertheless, he recommended that further evidentiary hearings be conducted to determine the extent to which it "compensated" for the Louisiana severance tax. *Id.* at 758.

This Court rejected that recommendation. It ruled that because the severance tax and the first use tax did not tax substantially equivalent events, the latter could not be considered a "compensatory" tax. *Id.* at 758-59 ("The two events are not comparable in the same fashion *as a use tax complements a sales tax*") (emphasis added). The Court therefore ruled that because the first use tax, standing alone, "undeniably violates the principle of equality", *id.* at 759, the tax clearly violated the Commerce Clause.

The facts of *Maryland v. Louisiana* are poles apart from that of *General American* and this case. Because the "first use" tax, unlike the taxes in *General American* and this case, was not "compensatory" to Louisiana's severance tax, it was analyzed in isolation and "unquestionably discriminate[d] against interstate commerce" both on its face and in its practical effect. *Id.* at 756. Whether the first use tax, if considered in conjunction with the severance tax, would unduly burden interstate commerce was not presented in *Maryland v. Louisiana*. Thus, *Maryland v. Louisiana* did not reach the issue presented here.[41]

Similarly misplaced is Petitioners' reliance on *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988). In that case, (which again did not involve a compensatory tax at all), an Ohio statute provided a tax credit against the Ohio Motor Vehicle Fuel Sales Tax for sales of ethanol. The credit, however, applied only with respect to ethanol produced in Ohio or in a state which on a reciprocal basis granted similar tax credits for Ohio-produced ethanol when sold in the other state.

Other than an argument concerning the reciprocity of the tax credit,[42] the State of Ohio essentially did not dispute the fact that

[41] Two other cases relied upon by Petitioners, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) and *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987), both involved the same issue presented in *Maryland v. Louisiana*: whether two different types of taxes reached "substantially equivalent events," and therefore could be considered "compensatory". That is far different than *General American* and this case, where the taxes did and do apply to substantially equivalent events, and therefore are truly compensatory.

[42] Unlike the situation in *New Energy*, the advantage provided to interstate commerce in our case is not hypothetical or dependent on legislation of sister states but rather is simply the functional result of the Missouri sales-use tax system.

the tax credit facially discriminated against interstate commerce and constituted economic protectionism. Rather, the State argued that the discrimination was justified because, among other things, the amount of discrimination was limited. As it did in *Halliburton* and *Bacchus*, the Court rejected that argument, and invalidated the tax credit.[43]

Thus, *New Energy* is neither applicable here, nor inconsistent with *General American*. The tax credit in *New Energy*, unlike Missouri's sales-use tax statutes, gave in-state ethanol producers an undeniable economic advantage in the Ohio marketplace. Out-of-state competition on the other hand was *always* disadvantaged. Under *General American*, that type of credit likewise would have been invalidated.

Wyoming v. *Oklahoma*, ___U.S.___, 112 S. Ct. 789 (1992), another case relied upon by Petitioners, did not involve taxes at all, but rather an Oklahoma statute which required Oklahoma utility companies to burn a mixture of coal which consisted of at least 10% Oklahoma-mined coal. In holding that the statute discriminated against interstate commerce, the Court stated that "[s]uch a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Id.* at 800.

The facts of *Wyoming v. Oklahoma* are easily distinguishable. There, the statute simply operated as an unmitigated preference for Oklahoma-mined coal. As in other cases cited by Petitioners, the State essentially did not dispute the protectionist nature of the statute, but rather, argued that the patent discrimination was justified by counterveiling considerations. The result, however, was inescapable — Oklahoma coal was *always* provided a

[43] Here, not only is discrimination not "patent," 486 U.S. at 276, there is no discrimination against interstate commerce at all.

preference over out-of-state coal to the extent of the 10% required usage.[44]

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a New York statute provided a credit against the corporate franchise tax imposed on the income of a Domestic International Sales Corporation ("DISC"). The credit, however, was provided only with respect to income derived from the exportation of products from a "regular place of business of the taxpayer within [New York]." *Id.* at 393.[45]

In holding that the credit discriminated against interstate commerce in violation of the Commerce Clause, the Court described the local favoritism as follows:

> "Thus, not only does the New York tax scheme 'provide a positive incentive for increased business activity in New York State' . . . but also it penalizes increases in the DISC's shipping activities in other States." *Id.* at 400-401.

The facts in *Westinghouse* are clearly inapposite to the facts in this case and in *General American*. The undisputed purpose of the DISC credit was to "provide a positive incentive for increased business activity in New York State." *Id.* at 393. The DISC credit also discriminated in practical effect against out-of-

[44] Three other non-compensatory tax cases relied upon by Petitioners similarly involved admittedly isolationist legislation. *See Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct. 2009 (1992); *Ft. Gratiot Landfill v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992); and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In each case, this Court simply examined the statute to determine whether it was "basically a protectionist measure." *Philadelphia v. New Jersey*, 437 U.S. at 624. After finding that the practical effect of each statute was to allow the jurisdiction "to isolate itself from the national economy," *Fort Gratiot*, 112 S.Ct. at 2024, this Court found all three to be violative of the Commerce Clause. None of those cases bears any resemblance to the facts presented here.

[45] Therefore, the amount of the credit was directly related to the percentage of the DISC'S total exporting activities originating from New York. *Id.* at 400.

state exporting activities as a class and therefore unduly burdened such activities on an overall basis. That situation did not exist in *General American* and does not exist here.[46]

Similarly, in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), New York imposed a transfer tax on the sale of securities in which any part of the transaction occurred within New York. The rate of tax, however, was heavier on a nonresident of New York if the ultimate sale of the security occurred on a securities exchange other than one located in New York. Thus, the practical effect of the tax differential was to provide New York securities exchanges an advantage over security exchanges located in other states. *Id.* at 326-27. The tax differential *always* favored New York exchanges over securities exchanges located in other states. Therefore, the Court held the tax to be violative of the Commerce Clause because "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. The factual circumstances of *Boston Stock Exchange* are patently distinguishable from that of *General American* and this case.

A finding of economic protectionism likewise was dispositive in another of Petitioners' non-compensatory tax cases. In *Polar Ice Cream & Creamery v. Andrews*, 375 U.S. 361 (1964), Florida regulations required milk distributors within a certain region of Florida to purchase their milk within that region. Only if no milk was available from that region would the distributors be allowed to purchase milk produced out-of-state. Noting that the Florida

[46] An equally straightforward case of local favoritism was presented in another of Petitioners' cases, *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___ U.S. ___, 112 S.Ct. 2365 (1992). There, Iowa's income tax statutes allowed a corporate deduction for dividends received from a U.S. subsidiary. No deduction, however, was provided for dividends received from a foreign subsidiary. The tax therefore undeniably discriminated against foreign subsidiaries both individually and as a class. *See id.* at 2368. Like *Westinghouse*, *Kraft* has little to do with *General American* or this case.

regulatory scheme in effect "reserves to its local producers a substantial share of the Florida milk market," 375 U.S. at 375, the Court held it violative of the Commerce Clause.

For obvious reasons, *Polar Ice* has no application to this case or to *General American*. *Polar Ice* is simply another case of isolationism and blatant economic protectionism in which in-state economic interests were *always* favored over out-of-state interests.[47]

In summary, none of Petitioners cases resemble the factual situation presented in *General American* and in this case. All are fully consistent with *General American's* rationale and holding, and with that of the Court below. They provide no basis for overruling *General American* or reversing the lower court's sound decision. This Court therefore should do neither.

III. GENERAL AMERICAN SHOULD NOT BE OVERRULED.

Tacitly conceding that *General American* is dispositive on the facts presented in this case, Petitioners call upon this Court to overrule that long-standing precedent.[48] They claim that *Gen-*

[47] Another state law favoring local milk businesses was similarly invalidated in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). There, an ordinance prohibited the sale of milk labeled as pasteurized unless it had been processed and bottled within a five mile radius of the city. In addition, the ordinance, in effect, prohibited the sale of milk originating beyond 25 miles of the city. As with *Polar Ice*, the isolationism and blatant economic protectionism of *Dean Milk* distinguish it from *General American* and this case.

[48] Assuming this Court decides to overrule *General American* (it should not), that ruling should be applied prospectively only based on the three-pronged test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *See American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 169 (1990). Alternatively, this case should be remanded with directions to determine whether each prong of the *Chevron Oil* analysis has been satisfied in the instant case. Respondent acknowledges the Court's holding in *Harper v. Virginia Dep't of Taxation*, ___ U.S. ___, 113 S.Ct. 2510 (1993), but that case should be limited to its facts.

eral American is inconsistent with this Court's precedents, that it is a "derelicit hazard confusing the lower courts," and therefore should be "moored to its facts or sunk." Petitioners' Brief, p. 29.

Only in compelling and rare circumstances, however, has this Court chosen to overrule its precedents. As this Court recently recognized in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2808 (1992):

> "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."

The Court in *Planned Parenthood* articulated a "series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.* Those considerations, none of which were directly addressed by Petitioners or their Amicus, are:

> "(1) Whether the rule has proved to be intolerable simply in defying practical workability;
>
> (2) Whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;

> (3) Whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and
>
> (4) Whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 2808-09.

Under the first factor, in no sense can the rule of *General American* be deemed to defy "practical workability." Determining the "average" local tax rate merely requires a simple mathematical calculation with readily available data. The other prong of *General American*, whether the tax is discriminatory "in purpose," likewise easily falls within a court's "judicial competence." *Planned Parenthood*, 112 S.Ct. at 2809. Thus, the first factor strongly weighs in favor of not overruling *General American*.

With regard to the second factor, the State of Missouri, and other states, have relied upon *General American* in devising their tax systems. If *General American* is overruled, not only would Missouri be required to revamp its sales-use tax statutes, but it and other states would be required to reexamine all "in lieu" taxes, taxes like those in *Dunbar-Stanley* and a host of other taxes that were enacted in reliance upon *General American*. For this reason, this Court should be particularly hesitant to overrule precedents in the area of state taxation, which is an essential component of state sovereignty.

The third factor, whether the rule is no more than a "remnant of an abandoned doctrine," likewise counsels against overruling *General American*. As Sections I and II of this brief demonstrate, *General American* is fully consistent with this Court's current Commerce Clause jurisprudence. Like *Maryland v. Louisiana*, *General American* recognized that the constitutionality of a "state tax must be assessed in light of its actual effect considered in conjunction with other portions of the state's tax

scheme." *Maryland v. Louisiana*, 451 U.S. at 756. Consistent with *Tyler Pipe* and *Maryland v. Louisiana*, the Court in *General American* recognized that the "concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Tyler Pipe*, 483 U.S. at 242 (quoting *Maryland v. Louisiana*, 451 U.S. at 758.)[49] Like *Complete Auto*, *General American* "considered not the formal language of the tax statute but rather its practical effect." *Complete Auto*, 430 U.S. at 279.[50] Like *Wyoming v. Oklahoma*, *Philadelphia v. New Jersey*, *Fort Gratiot*, and *Bacchus*, *General American* focused upon whether challenged statute constituted "economic protectionism."[51] Consistent with the teachings of *Quill* and *Commonwealth Edison*, *General American* analyzed whether the tax placed "an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden[ed] interstate commerce", *Quill*, 112 S.Ct. at 1913 (emphasis added), or whether the state merely was attempting to tax its "just share" of interstate commerce, *Commonwealth Edison*, 453 U.S. at 623-24.[52]

General American further provides, in accordance with *Quill*, a "bright-line rule in the area of sales and use taxes." *Quill*, 112 S.Ct. at 1915. Under *General American*, if the average tax rate on intrastate commerce is less than the tax rate on interstate commerce, the tax does not violate the Clause.[53] Like *Dunbar-*

[49] In *General American* that "burden" was the combined effect of the varying local property taxes imposed upon Louisiana residents. 270 U.S. at 372.

[50] *General American* focused upon the "practical operation" of the tax. 270 U.S. at 375.

[51] *See, e.g., General American*, 270 U.S. at 372-73.

[52] See, *e.g., General American*, 270 U.S. at 373.

[53] That assumes, of course, no protectionist purpose is shown. Here, no purpose to discriminate has been shown or is evident from the statute. Indeed, the Additional Use Tax results in *less* of a burden to interstate commerce, both in both "dollars and cents" and in "practical operation," than its repealed predecessor.

Stanley, *General American* focused not upon whether a state taxing scheme might allow for possible "instances" of unequal treatment, but upon whether the *overall* effect of the state's tax system "unfairly" burdened interstate commerce. *Dunbar-Stanley*, 393 U.S. at 542. *General American*, like *Halliburton*, measured that burden "in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S. at 70. Thus, far from a "remnant of an abandoned doctrine," *General American* remains vital today.

Finally, no "facts have changed or come to be seen differently" so as justify overruling *General American*. Thus, all the *Planned Parenthood* factors convincingly illustrate why *General American* should not be overruled.

Because *General American* is fully consistent with this Court's current Commerce Clause jurisprudence and the underlying anti-protectionist purpose of the Commerce Clause itself, it is not, as Petitioners claim, a "derelict hazard confusing the lower courts." It instead provides a useful benchmark upon which future courts (and States in devising their tax systems) may reasonably rely. Thus, *General American* should not be "moored to its facts or sunk," as suggested by Petitioners, but used as one "bright-line" beacon in an otherwise murky sea of Commerce Clause jurisprudence.

Conclusion

For the reasons stated above, the sound decision of the Missouri Supreme Court should be affirmed.

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ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, DIRECTOR OF REVENUE, and DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, and THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

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QUESTIONS PRESENTED

1. When sales tax rates on in-state purchases of goods are partially determined by the state's local taxing jurisdictions and thus vary within the state, does a complementary statewide use tax on goods consumed in the state but purchased outside, unconstitutionally discriminate against interstate commerce if it is set at a rate much lower than the average rate applied to in-state sales, but higher than the lowest sales tax rate available somewhere in the state?

2. Should *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926) be overruled?

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COUNTERSTATEMENT OF THE CASE

This case presents a discrete, practical problem of state taxation. Through a compensating use tax, Missouri has tried to ensure that those persons or businesses purchasing goods outside the state for use in the state pay their fair share of taxes relative to those paying sales taxes on

purchases made in the state. The practical problem arises from the fact that sales tax rates are not uniform statewide, but are in part set locally. The sales tax rate thus varies depending on where in the state the purchase is made. A statewide use tax rate cannot be the "same" as all the varying sales tax rates. Therefore, the state must develop some equivalent rate which satisfies commerce clause concerns.

Factual Background

1. This case arises out of Missouri's attempt to establish a use tax on interstate purchases to complement the sales taxes imposed on in-state purchases. A combined sales tax of 4.225% is levied statewide on all personal goods purchased in the state (App. 34). Mo. Rev. Stat. (1992) § 144.020; Mo. Const. Art. IV, §§ 43(a), 47(a). In addition, counties and incorporated villages, towns and municipalities are authorized to impose local sales taxes beyond the 4.225% levied statewide (App. 34).[1] Most every locality in Missouri with the authority has done so.

2. There are 928 incorporated municipal[2] taxing jurisdictions within the state and 114 counties. In every instance (with the exception of St. Louis City), towns, cities and villages are located within counties. Thus, in connection with most purchases of goods, the seller will generally remit a county sales tax and, if the sale takes place in an incorporated municipality, that tax as well. That the municipal sales tax rate in Clinton, Missouri is 1%, for instance, is of little comfort to the shopper

[1] *See, e.g.*, Mo. Rev. Stat. (1992) §§ 66.600-630; 67.500-545; 92.400-420; 94.500-510; 94.600-655; 94.700-745. All citations referenced by "§" are to Revised Statutes of Missouri.

[2] Official Manual, State of Missouri, 892 (1993-94). The Official Manual, State of Missouri, is published biennially by the Missouri Secretary of State pursuant to § 11.020. Of the 928 incorporated municipalities, 91 are located within St. Louis County. The record reflects that the local sales tax rate in all parts of St. Louis County is uniformly 1.5%.

who must also pay the additional .5% sales tax imposed by Henry County. That being said, it is true that there are areas within Missouri where the effective sales tax rate—composed of the state, the county and any municipal tax—is lower than the use tax rate, and in what appears to be the majority of these "jurisdictions"[3] the overall sales tax is lower than the use tax.

3. As respects the economic impact of the sales tax, however, the reference to the majority of jurisdictions is misleading. As of 1990 (the year which is the primary focus of the evidence in the record), a supplemental sales tax of 1.5% or more was levied in cities and counties accounting for 73.5% of Missouri's population and on 93.14% of Missouri's taxable sales (Record, in Legal File, at 333, 531).[4] In some areas, purchasers pay up

[3] References to more than 1500 "taxing jurisdictions," *e.g.*, Pet. Br. at 7, are apparently drawn from listings by locales. *See, e.g.*, App. 67, and the "Chart of City and County Sales Tax Rates" set forth in the Missouri State Tax Reporter (CCH) ¶ 60-430 at 6167-93 (1990) (*see* Record, in Supplemental Legal File at 11-37). These are not, however, listings of "taxing jurisdictions." They include not only counties and incorporated municipalities, but also general census or locale designations—such as crossroads and other identifiable areas—which are not "taxing jurisdictions," but merely unincorporated areas within counties.

Only counties and incorporated municipalities have authority to impose local sales taxes. It is therefore more accurate to say that there are approximately 1042 potential "taxing jurisdictions"—that is, the approximately 928 incorporated municipalities plus the 114 counties in Missouri. The record reflects that when a county adopts a local sales tax, the tax is applicable to sales throughout the county—both outside of and within incorporated municipalities. The record further reflects that 112 counties plus the City of St. Louis have adopted local sales taxes—with only Dunklin and Reynolds Counties not having done so. Of the 5.2 million Missouri residents, 32,070 reside in Dunklin County and 6,723 reside in Reynolds County, for a total of 38,793. Of those 38,793, it appears that 23,984 live in municipalities which have local sales taxes. Missouri Official Manual, 854-891.

[4] As is typical of sales taxes, the tax is based on the rate in effect where the purchase is made (where the seller is located)

to 3.5% in additional sales taxes (App. 67).[5] Those areas in which sales are taxed at a rate of 5.725% or more (that is, 1.5% above the 4.225% imposed statewide) include virtually all of Missouri's largest and fastest growing cities and communities, those with large populations, concentrated and thriving business communities, and expensive infrastructures to support. The fast-growing City of Branson, for instance, currently imposes a combined city/county sales tax rate of 3%. Multistate Sales Tax Guide (CCH) 6-150MO at 11,533 (1994). In contrast, those areas with an effective sales tax rate lower than 1.5% tend to be the least populated in Missouri.[6] Two of the several localities specifically cited in

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rather than where the goods are delivered or where the purchaser resides. § 144.021. The only exception is for the purchase of automobiles and boats. § 144.020 1(8). Levying a tax by place of residence generally creates a potential for abuse because one must rely on the purchaser to accurately report its residence. Sales taxes are relatively easy to administer because the seller applies the same tax on every sale. *See* J. Hellerstein and W. Hellerstein, *State Taxation*, ¶ 16.01 (1993). With respect to automobiles, the registration on the automobile tells definitively where the residence is.

[5] Overall, the average sales tax rate on in-state transactions was 1.811%. (As derived from App. 68.)

[6] Of the approximately 928 incorporated Missouri municipalities, only one (Clarkton in Dunklin County) has no local sales tax (municipal and/or county) in effect. Indeed, in 174 of the 179 largest Missouri municipalities (those with a population in excess of 2,500), sales are subjected to a combined city/county local sales tax of 1.5% or more. The rate is 1.5% or more in *each* of those cities with a population in excess of 12,500. *Compare* Missouri Official Manual, 982-927 *with* Multistate Sales Tax Guide (CCH) 6-150MO at 11,531-557 (1994). One city with a population in excess of 6,000, Monett, formerly had a 1.87% tax rate in that part of the City within Laurence County, and a rate of 1.375% in that part within Barry County. Monett now has a tax rate of 1.875% throughout. *Id.*

Moreover, it appears that in 173 of 188 incorporated municipalities which have populations of between 750 and 2,500, the combined local sales tax rate is 1.5% or more. *Id.* Finally, of 90 incorporated

the parties' stipulations below as having sales tax rates lower than the use tax rate (Bixby and Glover in Iron County) could claim absolutely *no* residents in 1990. Three others had only sparse populations (Brandsville—167; Winston—251; New Cambria—223; and Gordonville—345). *Compare* App. 35 *with* Missouri Official Manual, 892-927 (1993-94).

4. The record in this case was built primarily around the sales tax rates in effect in 1990. The court below found as fact that those taxes were unlikely to decrease. (Pet. App. A-38.)[7] Indeed, the record shows that when sales taxes have expired, localities have usually raised the rate. (Record, in Legal File, at 358-378, 307-310.)

5. As a complement to the sales tax, a statewide use tax of 4.225% has long been imposed on the out-of-state purchase of goods brought to, used or stored in Missouri. § 144.610. The tax is typically collected by the out-of-state vendor—at least if the vendor has sufficient contacts with the state to make such collection constitutionally appropriate. § 144.635. The use tax complements the sales tax, assuring that the sales tax levy is not frustrated by purchases in interstate, rather than intrastate, commerce.

Before 1922, then, there was a statewide sales tax and a statewide use tax, both at a rate of 4.225%. The sales tax, however, was supplemented at local level.[8]

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municipalities with populations of between 500 and 750, the combined local sales tax in 70 is 1.5% or higher. *Id.*

[7] That factual prediction has been borne out. Sales taxes have generally gone up, not down. *Compare* Record, in Supplemental Legal File 11-37 (Missouri Tax Reporter (CCH) for 1990) *with* Multistate Sales Tax Guide (CCH) for 1994 ¶ 6-150MO, at 11,531-557. Indeed, in one of the areas stipulated to have a combined county and city sales tax of less than 1.5%, combined taxes have increased to 1.875% since 1990 (Monett in Barry County). *Compare* Record, in Supplemental Legal File, at 27 *with* Multistate Sales Tax Guide (CCH) ¶ 6-150MO, at 11,547.

[8] For one year before it implemented the supplemental use tax, Missouri authorized individual municipalities to enact use taxes. § 144.747. No such local use taxes were enacted apparently because

In 1992, the Missouri legislature established a 1.5% statewide supplemental use tax, thus establishing an overall use tax of 5.725%. § 144.748. In choosing that rate, the legislature considered the fact that more than 90% of in-state taxable sales were taxed by localities at a rate equal to or higher than the use tax rate on interstate sales under section 144.610. (App. 117-18.)

Section 144.748 provides that the revenue generated by the use tax is to be distributed to local jurisdictions in proportion to the amount of local sales tax revenues they receive. Because localities imposing no sales tax receive no such revenues, section 144.748 creates a marginal incentive for counties and municipalities to maintain or increase the sales tax rate. (Pet. App. A-38.)

At the same time, section 144.748 bars localities from supplementing the statewide, uniform use tax. Because the use tax does not vary by local jurisdiction, the out-of-state vendor selling goods for use in Missouri does not have to try to determine which local rates apply to each transaction and then report on its determination in remitting the collected tax to Missouri state officials.

The Parties and Proceedings Below

In 1992, Petitioners Associated Industries of Missouri and Alumax Foils, Inc. brought this action in the Circuit Court for Cole County, Missouri. Although the vast majority (more than 90%) of in-state sales are burdened by a sales tax equal to or greater than the tax imposed by section 144.748 on interstate purchases, Petitioners challenged the constitutionality of the statewide use tax under the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution, as well as provisions of the Missouri Constitution. They argued, *inter alia*, that section 144.748 was unconstitutional be-

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the statute prescribed no specific collection mechanism. This statute has since been repealed.

cause the combined state and local sales tax in "certain areas of Missouri" was lower than the use tax (App. 35). So far as the record reflects, neither Alumax Foils nor any member of Associated Industries resides in a jurisdiction which imposes a combined sales tax lower than the use tax.

Petitioners joined as defendant the State Director of Revenue, charged with administering section 144.748. Respondents Missouri Association of Counties (a not-for-profit corporation representing the interests of 112 Missouri counties), Missouri Municipal League (representing the interests of 540 municipalities), DeLong's, Inc. (a Jefferson City steel fabricating company), City of Blue Springs (a municipality in Jackson County), Associated General Contractors of Missouri (whose members include contractors and others with similar business interests), and Gary Markenson (a taxpayer residing in Jefferson City) intervened. Missouri's municipal and local governments have a direct financial stake in the outcome of the case, for while collection and administration of the use tax is centralized in order to reduce the collection burden, local governments are the beneficiaries of the tax.

The case was presented to the trial court largely on the basis of a stipulated record focusing on sales tax receipts for 1990. The trial court held that section 144.748 is not discriminatory vis-a-vis local sales taxes and that it did not burden interstate commerce. The court found that "intrastate sales in Missouri in calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5%," and that "the overwhelmingly predominant local sales tax rates in Missouri will remain at 1.5% or higher for so long as Section 144.748 . . . remains in effect." (Pet. App. A-38.)

The Supreme Court of Missouri affirmed. *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.

2d 182 (Mo. 1993) (*en banc*). In judging the constitutionality of the use tax rate, the court focused on whether there was discrimination against interstate commerce, not particular firms engaging in that commerce: "[W]e must recall that while the commerce clause protects 'interstate commerce', it does not require identical treatment of all taxpayers." *Id.* at 192.

Because more than 90% of the in-state sales were subject to a tax burden equal to or greater than the tax burden on out-of-state purchases, and intrastate sales bore a *greater* tax burden than they would have had they been subjected to a uniform rate equal to that of the use tax, the court held that the "tax was designed, and apparently works, to avoid discrimination on a statewide basis." *Id.* at 191. Because the case involved a complementary tax on interstate transactions "[i]n a state where a permissive system of local sales tax is allowed," the court invoked *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), and concluded that section 144.748 does not discriminate against interstate commerce "in purpose or practical effect." *Id.* at 192.

This Court granted certiorari.

SUMMARY OF ARGUMENT

This case presents a practical issue of state and local taxation arising out of Missouri's imposition of a uniform use tax on goods purchased out-of-state to complement the state and local sales taxes imposed on in-state purchases. Because of the delegation of taxing authority to local governments, sales taxes vary within the state. It is impossible for a single statewide use tax rate simultaneously to "equal" all of the varied sales tax rates set at a local level. In such circumstances, this Court has required that the constitutionality of the statewide rate on interstate transactions be tested against the average local rate. *See General American*, 270 U.S. 367; *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364 (1902). The rate established by the legislature here clearly satisfies the

Court's mandate: More than 90% of in-state sales were taxed at a rate equal to or higher than the state's use tax; and the burden on intrastate sales was $100,000,000 greater than it would have been had the use tax rate been applied to such sales. If anything, Missouri's sales tax-use tax structure treats interstate commerce *more* favorably than intrastate commerce.

Missouri's use tax does not by its purpose, on its face, or in its effect, discriminate against interstate commerce. Where the varying rates applicable to in-state transactions are a function of local legislative decisions, there can be no suggestion of a purposeful effort on the part of the state to engage in economic protectionism. Use of the average in-state rate as a point of reference ensures that the rate applied to interstate commerce does not disproportionately or unduly burden interstate commerce overall or any segment of that commerce, such as a particular industry or business. Alternative methods of setting a rate for a complementary use tax, designed to obtain what Petitioners might view as more perfect "equality" between intrastate and interstate commerce, stand on no firmer constitutional footing than the method employed by the Missouri legislature, the court below, and this Court in *General American*.

The *General American* approach to the problem of assuring even-handed treatment for interstate commerce where a complementary tax must respond to *varying* local tax rates has not been undermined by later cases. The cases cited by Petitioners all involved a net burden on interstate commerce. In addition, in each of those cases the discrimination was the product of a clearly drawn and prejudicial provision of law that squarely benefitted in-state interests, on the one side, over interstate commerce, on the other. By contrast, Missouri's sales tax-use tax structure and the rate chosen by the state create a classification under which most *interstate* purchases are treated as well as or more favorably than intrastate purchases,

and intrastate purchases as a class bear a disproportionate tax burden. In contrast to the cases relied upon by Petitioners, the structure of the tax here—where the asserted unevenness of in-state rates is merely the product of varying local rates—suggests no purposeful effort to benefit in-state interests or some particular in-state industry. Neither interstate commerce generally, nor any identifiable segment of that commerce, is discouraged.

Petitioners' assertion that interstate transactions must be taxed at a rate as low as that applicable to "each" in-state sale is in essence an argument that the Commerce Clause requires some sort of "most favored taxpayer treatment." This Court's cases, however, have not focused on particularized inequities claimed by specific firms doing interstate business. Rather, they focus on whether there is evidence of invidious economic protectionism or discrimination against *interstate commerce*. What is therefore demanded by the Court's cases is that in-state industry not be singled out for protection and interstate commerce not be unduly burdened; that no benefits be made available to in-state industry but denied interstate commerce; and that there be no adversely disproportionate impact on interstate commerce. All these demands are met in this case.

In the narrow circumstance represented by a state's effort to treat interstate commerce fairly and equally through a complementary tax when local rates vary, the state does not discriminate against interstate commerce when it sets the rate imposed on interstate purchases at a level equal to or lower than the average rate imposed on in-state sales. *General American* is fully consistent with this Court's commerce clause cases.

ARGUMENT

I. UNDER THE CASES OF THIS COURT, MISSOURI'S COMPLEMENTARY USE TAX RAISES NO INFERENCE OF ECONOMIC PROTECTIONISM OR DISCRIMINATION AGAINST INTERSTATE COMMERCE

1. The Commerce Clause was intended to prevent balkanization of, and economic warfare between, the states. Although the Commerce Clause does not eclipse the "power of the States to tax for the support of their own governments," (*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 87 (1824)), the Clause limits a state's power to levy certain kinds of taxes. The form of interstate economic warfare with which the Framers were most concerned was protectionist tariffs directed against interstate commerce for the protection of local economic interests. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

While protectionism is clearly proscribed, the Clause does not immunize interstate activity from state taxation. To the contrary, a state has compelling interest in insisting that interstate activity bear a fair and just proportion of the state's tax burden. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981).

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court described a four-part test intended to ensure that interstate transactions bear a fair proportion of state taxes, but no more. The requirement of *Complete Auto Transit* with the longest lineage is perhaps the prohibition on taxes which discriminate against interstate commerce.[9] The antidiscrimination principle stands as a bar against economic protectionism and state "taxes that pass an *unfair* share of the tax bur-

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[9] This Court has recognized and applied the anti-discrimination principle since at least 1875. *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280 (1875).

den onto interstate commerce." *Quill Corp. v. North Dakota*, —— U.S. ——, 112 S. Ct. 1904, 1913 (1992) (emphasis added). Petitioners' only claim in this case is that Missouri's use tax violates the prohibition on discrimination against interstate commerce.

2. Although the Court has consistently *dis*approved discriminatory taxes, the Court has just as consistently approved taxes directed at interstate commerce but designed merely to complement taxes imposed on comparable in-state events. A complementary tax is a levy on interstate transactions designed to match a specific, substantially equivalent levy on intrastate transactions. It thus *equalizes* the tax burden between *intra* and *inter*state transactions.[10]

The constitutional rationale for "complementary" taxation is plain. States face practical difficulties in levying taxes on matters with an interstate component. Thus, levies imposed in connection with interstate transactions must often take a form different from those imposed in connection with intrastate transactions. Because the tax cannot be the same, the state must develop fair equivalents in equalizing the burden as between interstate and intrastate transactions—at least if it is to ensure that *both* intrastate and interstate transactions pay their fair share.[11] The basic principle of complemenary taxation

[10] The CEO of Respondent DeLong's, Inc., a Jefferson City steel fabricator of bridges, testified that the company's sales from Jefferson City are subject to a 2% local sales tax, that all of its competitors except one are located out of state, that the margin of profit for steel fabricators nationwide is 1.8%, and that the lack of a local use tax on fabricated steel from out of state had placed DeLong's at a competitive disadvantage. App. 93-99.

[11] If circumstances were such that the state could readily impose the same tax on the interstate transaction as it imposed on the intrastate, there might be no need for a complementary—i.e. different but equivalent—form of taxation. *See* Hellerstein, *Complementary Taxes As A Defense To Unconstitutional State Tax Discrimination*, 39 Tax Law. 405, 407 (1986) ("The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale by imposing the tax on a subject within its taxing power—the use, storage, or consumption of property within the state").

therefore represents an acceptance of the fact that the tax on interstate transactions cannot be precisely the same as the intrastate tax, but may approximate that tax in a way that satisfies basic commerce clause concerns.

For example, in *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869), the Court considered a tax on liquor brought into the state for sale. Standing alone, such a tax would appear to single out interstate transactions. However, an identical tax was imposed on liquor manufactured in the state. Although the two taxes were imposed at different points in the distribution chain—one on the *distiller* and the other on the *dealer*—the Court held that the distinction was not constitutionally significant in light of the overall purpose of obtaining revenue from the sale of all liquors:

> [W]hereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State.

75 U.S. (8 Wall.) at 153.

Complementary taxes must, of course, address "substantially equivalent events." *See Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). It is largely through this requirement that the Court ensures a true "apples to apples" comparison. By insisting that the tax burden falls on interstate and intrastate businesses and transactions in a "substantially" similar way, the courts ensure that particular out-of-state businesses or industries have not been

competitively disadvantaged in relation to in-state competitors.[12]

3. At one level, a complementary tax simply ensures that interstate commerce bears its just share of the tax burden—specifically, a burden equivalent to that borne by similar, wholly in-state transactions or events. It thus permits a state to raise proportionate revenues from interstate transactions, and thwarts attempts to avoid or evade a state tax burden by conducting business across state lines. As this Court held in *Complete Auto Transit*, it "was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." 430 U.S. at 288 (quoting *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

At the same time, a complementary tax "protects" in-state businesses from being forced to bear a *disproportionate* share of the tax burden, resulting in a competitive disadvantage. It does this by erasing any "tax incentive to engage in interstate commerce instead of intrastate commerce." *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 243 (1987).

4. So long as the complementary tax structure addresses substantially equivalent events, and results in "substantially even-handed treatment" for interstate commerce (*Boston Stock Exch.*, 429 U.S. at 332), it raises no commerce clause concerns. A complementary tax

[12] To provide the assurance that the state is not burdening interstate commerce in a materially *different* way than it burdens in-state commerce, the comparison must be between two similar taxes which tax substantially equivalent things, both within the state's power to tax. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *Scheiner*, the Court held that even though in-state and interstate drivers were taxed at the same flat rate, the privilege of using the state's roads was decidedly more valuable to in-state drivers. *Id.* at 296.

goes beyond permissible bounds, however, if it "affirmatively places interstate commerce at a disadvantage." *Tyler Pipe Industries*, 483 U.S. at 243. That is, it "violates the Commerce Clause 'when it unfairly burdens commerce by exacting more than a just share from the interstate activity.'" *Id.* at 247 (quoting *Washington Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978).

5. The "paradigm" of permissible complementary taxation involves taxes on sales within the state, and complementary use taxes on the privilege of using goods purchased out-of-state.[13] *See Williams v. Vermont*, 472 U.S. 14, 24 (1985) ("A use tax is generally perceived as a necessary complement to the sales tax"). Such complementary use and sales taxes were first approved by this Court in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937), and many cases have since echoed this approval. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Nat'l Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (1977). The sales tax and use tax focus on substantially equivalent events; each applies only once to any purchase; each is assessed on the purchase price; and each taxes, in essence, the consumption of goods.[14] Accordingly, "the constitutional-

[13] As Professor Hellerstein has summarized, the sales-tax relationship was consciously created to address a troublesome gap in the sales tax structure attributable to the constitutional strictures prohibiting states from taxing sales consummated outside their borders or in interstate commerce. Because this gap threatened the states with a loss of revenue and local business, they "enacted 'complementary' use taxes." Hellerstein, *Complementary Taxes*, 39 Tax Law. at 406-07.

[14] Petitioners do not deny that the use tax and sales tax here are complementary in the sense that they tax "substantially equivalent" events or activities. *See Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981). "Compensating use taxes are functionally equivalent to sales taxes" in that both appear to tax the privilege of use or consumption. *See* Hellerstein, *Complementary Taxes*, 39 Tax Law. at 407.

ity of such state [compensatory use tax] schemes is settled." *Nat'l Geographic Society*, 430 U.S. at 555.

6. The complementary sales tax-use tax structure serves two "customary rationale[s]." *Williams v. Vermont*, 472 U.S. at 24.

First, collecting revenue from transactions with some interstate component, which would otherwise escape taxation, is a justifiable, non-protectionist end in itself. *See Ass'n of Washington Stevedoring Cos.*, 435 U.S. at 748 ("[a] State has a significant interest in exacting from interstate commerce its fair share of the cost of state government"). The use tax-sales tax structure thus compensates "the State for revenue lost when residents purchase out-of-state goods for use within the State." *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32 (1988).

Second, the compensatory tax structure protects in-state sellers from the possible loss of business which attends the state's imposition of a sales tax on local purchases. *Silas Mason Co.*, 300 U.S. at 583-85; *Maryland v. Louisiana*, 451 U.S. at 758-59. In other words, the complementary tax eliminates an unfair *advantage* that purchasers in interstate commerce would otherwise enjoy, and merely implements the long recognized principle that "[e]ven interstate business must pay its way." *Western Livestock*, 303 U.S. at 254 (quoting *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919)). Although the compensating tax therefore "protects" local business, it is not "protectionist" in a prohibited sense because "equality and not preference is the end . . . achieved." *Silas Mason*, 300 U.S. at 586.

The Court's repeated acknowledgment that these two purposes are legitimate disposes entirely of Petitioners' suggestion that the protection afforded by the tax here renders it unconstitutional. *See* Pet. Br. at 15. Every complementary tax affords protection. The protection afforded local businesses by a complementary tax, however, is merely a protection from disproportionate economic burdens; it reflects the elimination of a special *benefit* (in the form of escape from comparable tax burdens) which would otherwise be available to businesses engaged in interstate transactions. *See Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 349 (1944) (gross receipts tax on interstate transactions constitutional where denial of the power to levy such a tax "would be to make local industry suffer a competitive disadvantage"). That is far different from protecting local businesses from the travails of ordinary competition from interstate competitors, the protectionism barred by the Commerce Clause.

7. Equally fundamental to the states is their prerogative to allow subordinate local government bodies—counties, towns, municipalities, taxing districts—to impose taxes as the state deems necessary and expedient. *E.g., Columbus Southern Ry. Co. v. Wright*, 151 U.S. 470 (1894). Specifically, many states authorize local governments to impose sales taxes, often along with state-imposed sales taxes.

When local governments have independent authority to levy sales taxes, sales tax rates will necessarily vary *within* the state, depending upon where in the state—*i.e.*, in which taxing jurisdiction—the sale takes place. These variations in rates of local taxation are an accepted feature of state taxation, necessitated by local conditions and reflecting important political and economic choices. Petitioners would certainly not wish to question directly the principle that sales taxes may be set by local governments to meet local conditions and thus may vary within the state. But (as shown below) Petitioners' argument could seriously undermine a state's ability to maintain local authority over sales tax rates.

8. In addressing issues of complementary taxation, the Court has taken a practical approach to variations in the *intra*state rate produced by the delegation of taxing

authority to local governments. On the one hand, the need to impose a complementary tax—to counterbalance the potential loss of tax revenue, to guard against an unfair advantage to interstate commerce, and to ensure that interstate commerce bears a fair share of the tax burden —remains the same whether the tax is imposed at the state or the local level. On the other hand, there is an obvious difficulty (or, more accurately, an impossibility) in employing the "same" rate on one side of the equation (the state-imposed side of the complementary tax) if the rate *varies* on the other side (the locally-imposed side) of the equation.

Because a single statewide complementary rate applicable to interstate transactions cannot at the same time, and in a literal sense, *match* all the varying local rates, the Court has permitted a proxy for that match by looking to the *average* rate applied within the state to intrastate transactions. The Court has thus insisted that the tax applied to interstate transactions not discriminate against interstate commerce. Specifically, the Court has addressed the practical problem of varying local rates by focusing on the relative *overall* burden of the tax on interstate and intrastate commerce. Consistent with its approach to complementary taxes generally,[15] the Court has *not* tried to impose an abstract notion of equality and *sameness* that is, by virtue of the very fact of internal variation, impossible to achieve.

In *General American Tank Car Corp. v. Day*, 270 U.S. 367, 372 (1926), the Court considered whether there was an "unconstitutional burden on interstate commerce" in connection with varying local rates applicable

[15] The problem presented by this case is similar to the problem presented by complementary taxes in general: Because the tax on the interstate transaction can never be the *same* as it is on the intrastate transaction, the state must employ a proxy. The proxy employed in this context involves use of the average in-state rate as the measure of the permissible rate applicable to interstate transactions.

to residents and a statewide rate imposed on non-residents. Louisiana taxed the rolling stock of non-resident corporations at 25 mills, while the rolling stock of resident corporations was taxed at varying rates, depending on the parish and any municipality involved.

The most salient feature of the tax structure was, of course, that in "some parishes, local taxes exceed twenty-five mills [the tax imposed on the non-resident corporations], *and in others they are less than that amount. . . .*" 270 U.S. at 371 (emphasis added). This fact did not render the tax unconstitutional. Rather, in light of the impossibility of establishing a statewide tax rate which would "equal" all of the varying locally-based rates, the Court necessarily focused on whether the *average* rate paid by state residents was less or more than the rate imposed on non-residents and thus whether interstate commerce was disproportionately burdened by the tax.

This focus comports with the historic underpinnings of the Commerce Clause. The Clause "protects the interstate market, not particular interstate firms" (*Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 127 (1978)), from burdensome taxes. Absent a disparate burden on interstate transactions—or some way in which the state tax systematically favored in-state transactions or citizens —the system could not be said to discriminate against a class of interstate interests or favor a class of in-state interests. Absent some overall or net benefit to in-state businesses or industries at the expense of interstate commerce, it would be equally difficult to describe the rate established by the state as embodying the kind of economic protectionism with which the Commerce Clause is concerned.

In *General American*, the Court went on to suggest that the problem presented by varying local tax rates might be accommodated still further, explaining that in the absence of (1) a purpose to discriminate, or (2) some aspect of the scheme which made disproportionate

impact on interstate commerce "a necessary or continuing result of the scheme of taxation adopted," a temporary imbalance in one year caused by the rates ultimately set at a local level, might still pass constitutional muster.[16] 270 U.S. at 373. "[I]n such a scheme of complementary tax statutes, however fairly devised, it would be impossible to provide in advance against occasional inequalities as great as that here complained of." *Id.* at 374.[17]

Silas Mason, the case first approving complementary use taxes, relied upon *General American* as illustrating the absence of discrimination in a complementary tax structure. 300 U.S. at 585. Petitioners point out that as the Court framed the issues in *General American*, commerce clause concerns were held to be satisfied by the fact that the tax imposed on non-resident corporations was part of a complementary plan (270 U.S. at 372); "discrimination" was the focus of the equal protection analysis.

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[16] The Court went on to find that Appellant had failed to support its factual contention of discrimination even in that one year. The record did not "show the amount of the variation in the rate of local taxation [or] its average throughout the State." *General American*, 270 U.S. at 374. The record detailed tax rates in various parishes, but did not show variations *within* the parishes.

[17] This second aspect of *General American*—addressing an aberrational situation in which interstate commerce turned out to be disproportionately burdened in a given year, notwithstanding the establishment of a statewide rate not designed to produce that result—is obviously not at issue in this case.

Petitioners' *amicus*, Washington Legal Foundation, suggests that the defect in the use tax in the instant case is that it does not "guarantee" that sales taxes will not be exceeded by the use tax in some future year. Amicus Br. at 6. The court below found as fact that this was unlikely. (Pet. App. A-38.) Moreover, this Court does not ordinarily judge the constitutionality of state laws based on the possibility that in the future the laws might change. It suffices here that the current rate is not discriminatory and does not unduly burden interstate commerce.

But the question whether there exists discrimination *against interstate commerce* or non-residents is essentially the same under either constitutional provision: there is no discrimination against *interstate commerce* unless the classification at issue can fairly be said to have burdened that commerce, or some identifiable part thereof, more than local business. If the mere fact that *some* local jurisdictions charged rates lower than the rate of taxation imposed on interstate transactions presented a significant commerce clause concern, the tax at issue in *General American* could not have been sustained.[18]

In an earlier case, *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364 (1902), the Court addressed a similar issue. That case involved varying locally assessed stock taxes imposed on in-state residents, on the one hand, and a statewide rate and assessment method imposed on non-residents, on the other. The focus of the court below was on whether, as a whole or on average, non-residents were being asked to assume a disproportionate share of the tax burden:

> [T]he claim that in this case the inequality operates against non-residents or citizens of other States as a class is unfounded. . . . The average rate of taxation for municipal purposes for the 168 towns approximates fifteen mills, which is the rate for the special tax imposed in respect to non-resident shares; *but the average rate for municipal taxation in the ten larger towns (representing much more than half the grand list of the State) is about twenty-one mills.* The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate for special taxation and the valuation for the property subject to widely varying rates for municipal taxation, was to approximate a general equality in the burden that should fall on the two classes of property; and it well may be that the rule objected to in respect

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[18] *See infra* at 32-38.

> to the valuation of the interests of resident shareholders in corporations investing in taxable land still leaves, as a whole, a lighter burden of contribution resting upon non-resident shareholders.

Id. at 367-68 (emphasis added). Thus, particular emphasis was laid on the fact that *in the most populous jurisdictions the rate was far in excess of the rate applicable to non-residents. Id.* Although *some* local tax rates were lower than the tax on non-residents, the rate chosen by the state did not discriminate against non-residents "as a class."

Therefore, in *Travellers'*, the Court judged the tax structure in light of the practical problem of attaining something that could be regarded as "equal" where the tax had to be "equal" to a number of different rates. The Court held that the constitutional mandate was satisfied by the state legislature's effort to "apportion fairly the burden of taxes between the resident and the non-resident." *Id.* at 369. Thus:

> While there may result from year to year a variance in the amount of the burden actually cast upon non-residents as compared with that cast upon residents, yet it is also true that a *like inequality will exist between residents of different localities in the State by reason of the different rates of taxation in those localities. You cannot put one resident against one non-resident stockholder and by a comparison of their different burdens determine the validity of the legislation any more than you can place a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders.*

Id. (emphasis added).

To be sure, this discussion in *Travellers'* was in the context of the Privileges and Immunities Clause, rather than the Commerce Clause. The standard under both clauses is sufficiently similar to warrant analogy. *See*

Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978) (noting "the mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause—a relationship that stems from their common origin . . . and their shared vision of federalism").[19] But under whatever provision of the Constitution those cases were decided, *Travellers'* and *General American* illustrate the practical problem in trying to impose "equality" between a statewide use tax and varying local tax rates. In these circumstances, comparisons between the tax imposed on one interstate and one intrastate transaction cannot reveal discrimination against interstate commerce generally because the same disparities (or greater disparities) are found *within* intrastate commerce. *Id.* The solution thus lies in employing an average in-state rate as the basis of comparison rather than in pursuit of a notion of "absolute equality" which cannot be attained.

9. *General American* and *Travellers'* squarely reject what we understand to be Petitioners' most extreme formulations—either (1) that a statewide compensating use tax is invalid if the sales tax rate anywhere within the state is lower than the use tax; or possibly (2) that sales taxes imposed at a local level cannot be the subject of a compensating tax imposed statewide.[20] Pet. Br. at 22-27. As

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[19] *Cf. Austin v. New Hampshire*, 420 U.S. 656, 661-65 (1975) (discussing *Travellers'* and the standard of "substantial equality of treatment" to be applied under Privileges and Immunity Clause); *Toomer v. Witsell*, 334 U.S. 385 (1948) (higher license fee on nonresident than that on resident shrimp boat owners); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (higher fee on nonresident than resident commercial fisherman); *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984) (Privileges and Immunity Clause applies to laws that discriminate on the basis of municipal as well as state citizenship).

[20] Aside from *General American's* direct rejection of this last theory, it makes little sense as a constitutional or practical matter. *See* J. Hellerstein and W. Hellerstein, *State Taxation*, § 4.12[2][a] (1993) ("the Court can readily take into account the interrelations of such levies as sales and use taxes [imposed at a local level]

Petitioners (and their *amicus*) would have it, the asserted requirement of "absolute equality," Amicus Br. at 8-15, would mean that a use tax imposed on out-of-state purchases for goods used within the state, would discriminate against out-of-state sellers if *any* in-state sales were subject to a lower sales tax. That the area with the lower rate may be 300 miles across the state, or that the rate prevails only in areas with sparse population, little industry or commercial activity, would have no effect on the outcome under the "bright line test" described variously by *amicus* as "absolute equality" or "equality in each and every instance." *Id.* The insistence on a perfect match between interstate transactions and intrastate transactions was rejected in *General American* and *Travellers'*.

10. Under Petitioners' view, Missouri would either have to (1) withdraw from it's subdivisions the right to impose sales taxes at a local level to meet local needs, and instead adopt a uniform rate to allow the use tax in all instances to match the sales tax; or (2) set the statewide use tax at the *lowest* rate available anywhere in the state.

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growing out of the same purchase and sale"). If a county or municipality established a special tax directed *against* interstate transactions, the Court would plainly invalidate the tax, even though it is not applied statewide. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, —— U.S. ——, 112 S.Ct. 2019 (1992). Thus, local taxes can *violate* the Commerce Clause. There is no reason they cannot provide a justification for a statewide tax on interstate commerce. The need for a complementary use tax to ensure a fair burden on interstate commerce is the same whether the sales tax is imposed statewide or locally. The state is free to authorize subordinate government units to levy taxes as it sees fit. The state, of course, bears the ultimate responsibility for such taxes under the Commerce Clause.

If Petitioners' theory is that if the sales tax is imposed at a local level, the use tax must also be imposed locally, suffice it that this theory too is inconsistent with *General American*, and we are unaware of any rule which would bar a state from dealing with a problem of interstate commerce on a statewide basis.

The first alternative would mean a fundamental change in the powers of local government under state law. The Commerce Clause ought not be the vehicle for requiring a major reallocation and change in the state's internal political structure or its taxing system.[21] *See Williams v. Vermont*, 472 U.S. at 22 ("[T]he States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. . . [The Court] has been reluctant to interfere with legislative policy decisions in this area") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)).

The second alternative demonstrates that the Petitioners have failed to grasp the purpose of, and constitutional foundation for, complementary use taxes. Setting the use tax rate at the *lowest* rate available in the state would frustrate the central objectives of a compensating use tax: providing the state with comparable revenue for the in-state consumption of goods wherever the goods were acquired and alleviating the prejudice to local business caused by allowing purchasers to escape the consumption tax burden by purchasing out-of-state. The Commerce Clause was not intended to exempt taxpayers from paying their fair share of a state's tax burden merely because they shop in interstate commerce. *See Complete Auto Transit, supra.*

If most of the citizens of the state were taxed at a rate of 5% for the privilege of using goods purchased within the state, and persons who purchased the same goods out-of-state were taxed at only 2% for the privilege of use (because one municipality within the state imposed

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[21] The prerogative of county and municipal governments to set tax rates at levels to meet local needs is an important one. Different localities have different needs and the flexibility to meet those needs through the imposition of local taxes, geared to local conditions, is important.

only a 2% tax for the privilege of use of the goods purchased in that jurisdiction), then few would doubt that out-of-state sellers were better off and less burdened than their in-state counterparts. Nor would one doubt that the tax favored interstate commerce. Yet, that is the form of "equality" which Petitioners seek to impose.

In the context of taxes which concededly meet the basic criteria for complementary taxation, forcing states to fundamentally change their internal tax structure in order to effect a more perfect match with the tax on interstate transactions would allow the tail to wag the dog. Indeed, this Court's acceptance of the basic principle of complementary taxation belies any suggestion that the Commerce Clause mandates such fundamental changes in the state's internal tax structure.[22] To the contrary, the *premise* of complementary taxes is that a literal match is unattainable and a perfect match is unnecessary so long as the state chooses a proxy which imposes a tax on "substantially equivalent" events and a comparable burden on in-state and out-of-state commerce. So long as substantial equivalence is achieved, the state is permitted to satisfy its own compelling need to obtain revenue from interstate commerce and "equalize" the tax burden between interstate and intrastate commerce. Petitioners' ar-

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[22] If such changes were constitutionally required, a state which imposed a use tax in connection with interstate commerce would presumably be required to impose a use tax, rather than a sales tax, on in-state sales so that an exact match with the tax on interstate sales could be achieved. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76-77 (1963) (Brennan, J., concurring) (describing differences between use sales taxes). *See also Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 153 (tax need not be imposed directly on the same party in the chain of distribution; state is entitled to choose the most "expedient" in-state tax (on the distiller) and develop an equivalent tax for the out-of-state transaction (on the distributor)); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 478-82 (1932) (taxes on in-state "dealers" and "importers" of interstate goods are complementary).

gument for equality in each and every instance would extend this Court's commerce clause jurisprudence far beyond where it has been extended before.[23]

11. At bottom, Petitioners would simply ignore the fact that most transactions (more than 93%) within the state are subject to an equal or higher rate of taxation than the tax imposed in connection with interstate transactions. *Cf. Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940) ("Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations"). More centrally, Petitioners' approach ignores what ought to be the principal concern in any inquiry about whether a complementary tax scheme actually discriminates against interstate commerce: Whether there is, in fact, some line drawn by the state, or some disparate burden imposed on interstate commerce, that favors (or perhaps demonstrates an intention to favor) local interests at the expense of out-of-state interests. Where the average burden of the sales tax-use tax structure falls *more* heavily on intrastate transactions, it is difficult to describe the scheme as evincing unconstitutional discrimination against interstate commerce, either in purpose or effect. *Cf. Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) (state taxes which favor out-of-state commerce are not constitutionally suspect under the Equal Protection Clause). The tax structure here does not discriminate against interstate commerce generally or any definable segment of that commerce or industry.

12. There is no constitutionally "fairer" way to evaluate the interstate tax than that employed by this Court in *General American* and *Travellers'* and followed by the court below. For example, Petitioners hint that the use

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[23] *See infra* at 32-38.

tax might vary with, or be measured against, the sales tax applicable at the principal place of business of the firm making an interstate purchase. That approach would not yield any more constitutionally satisfying result.

Notably, Petitioners do not press that approach. Petitioner Alumax is not headquartered (*see* App. 6) in a jurisdiction where the sales tax is lower than the use tax.[24] Thus, having the use tax match the rate in effect at the place of residence would not aid Petitioners. Petitioners have no standing to argue the interests of businesses which operate in jurisdictions where lower rates prevail and which (under the "tax rate of residence" scenario) would benefit from a constitutional rule that the use tax must reflect the sales tax in effect at the place of residence.[25]

Indeed, imposition of a "sales tax rate of residence" scheme in Missouri would result in *higher* use tax rates in connection with most interstate transactions, a *greater* tax burden on interstate commerce generally, and a *greater* burden on most (and perhaps all) taxpayers engaging in interstate commerce. Moreover, the constitutional *remedy* in this case under such a theory would simply be to require a partial refund of use taxes to those businesses located where the use tax is higher than the sales tax—in order to restore the match between the sales tax at the place of residence and the statewide use tax.

But considering "the tax rate of residence" approach as simply one of the alternative, permissible methods of

[24] Neither is that fact coincidental. Higher rates tend to prevail where the need for government revenue is great because of dense population or the need to maintain significant infrastructure—in short, the very things that would tend to cause industry to locate in a particular area.

[25] The effect on out-of-state sellers (whose interest Petitioners assert) is essentially the same under either scenario. *See infra* at 36-37.

taxation that might be available to the state, it is not a method of avoiding discrimination against interstate commerce superior to that employed here. Place of residence is of little direct value in evaluating sales tax burdens.[26] The applicable sales tax rate is the rate prevailing at the place of the sale, *not* the place of residence.[27] Thus, one can readily obtain a lower sales tax rate by travelling to a place where a lower tax prevails.[28] In this way, the "sales tax of residence" approach fails to provide the one assurance that is available through the method of analysis applied by the court below: that interstate transactions as a whole bear their fair share, *but no more than their fair share,* of the state's tax burden.

Moreover, having the use tax vary with the sales tax applied at the place of residence raises a number of practical problems. The use tax is generally collected by the out-of-state vendor. If the rate were to vary depending upon the place of use or the purchaser's place of business, the vendor would have to rely on the purchaser for accurate information.[29] Based on that information, the

[26] As the court below correctly pointed out, "residents of one county may travel to another for tax advantage purchases. Depending upon the actual tax rates, demographics and purchasing patterns, they might even result in greater discrepancies." 857 S.W.2d 182, 192 (Mo. 1993) (*en banc*).

[27] A sales tax is imposed at the point of sale, allowing its collection at a single fixed rate by the seller as part of its customary and required way of doing business. It is not surprising that where a state has a choice, it will prefer to employ a *sales* tax, rather than a use tax. *See* Hellerstein, *State Tax Discrimination Against Out-of-Staters*, 30 Nat. Tax J. 113, 118 (1977).

[28] In view of the difficulties created by using place of residence to determine the applicable use tax, one state court has declared such a system unconstitutional. *American Modulars Corp. v. Lindley*, 54 Ohio St.2d 273, 376 N.E.2d 575, *cert. denied*, 439 U.S. 911 (1978).

[29] Any system of taxation which relies upon the purchaser to provide the information which will determine which tax rate will apply is ripe for evasion.

vendor would try to determine a current applicable rate from more than a thousand of Missouri's taxing "areas." Because these rates change, the out-of-state vendors' Missouri tax charts would have to be frequently revised.[30] The vendor would necessarily be burdened further by individually reporting on the applicable rate in remitting the tax to state authorities. In order to reduce tax evasion and the burdens associated with using place of residence (which varies with each transaction), sales taxes are imposed based on place of sale, rather than the purchaser's residence. Having established such a convenient standard for in-state sellers, it would make little sense to impose onerous chores on *out-of-state* sellers who have the misfortune to sell to Missouri purchasers. *See generally National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753, 759-60 (1967).[31]

13. Petitioners make much of the median or average rate, noting that in more than 50% of the state's taxing *jurisdictions*, the sales tax is lower than the use tax. *See* Pet. Br. at 4; Cert. Pet. Question 1. We have pointed out that Petitioners' use of the term "taxing jurisdictions" is somewhat misleading inasmuch as many of the "jurisdictions" are simply unincorporated locales and do not in fact have taxing authority. *See Counterstatement of Facts, supra*, at 3. But holding aside those difficulties, it is entirely artificial to count up the taxing jurisdictions and then ascribe to each of them an equal voice, regardless of

[30] There are few short-cuts to identifying the applicable rate. Rates may vary even within a particular zip-code, with some areas in the zip-code within one incorporated area, a second within another, and a third in an unincorporated area with only a county tax.

[31] We do not suggest that a place of residence approach would violate the Commerce Clause—it would likely meet the standard of "substantial equivalence" between the treatment of in-state and interstate transactions. But the "sales tax of residence" approach ought not be required to displace the alternative—squarely grounded in this Court's cases—employed by the state in this case.

population or the number and financial significance of transactions actually subject to each rate. *Cf. Travellers'*, 185 U.S. at 368.

Modern commerce clause analysis focuses on the "practical effect" of a challenged tax. *Complete Auto Transit*, 430 U.S. at 279. The court below was attentive to that direction. To ensure that goods used in the state, though acquired outside the state, bore a fair share of the tax burden, but no more than a fair share, the court focused on the sales tax burden on in-state transactions as the market actually operates. 857 S.W.2d at 192. The court thus looked to the number of sales subject to each rate, and not an abstract average of the prevailing rates in the various jurisdictions, to determine the comparative burden of the tax on in-state and interstate transactions.[32] *Id.* at 191.

Specifically, the court noted that only "6.86% of in-state sales in 1990 were made in localities where the interstate use tax rate would have been *higher than* the intrastate sales tax rate. . . ." *Id.* (emphasis added). In-state sales bore a far greater tax burden than interstate sales. Indeed, employing the *use tax rate* to *intrastate* transactions (instead of the sales tax rate) would have *reduced* the taxes imposed on in-state business by $100,000,000. *Id.* at 185. These facts refuted any suggestion that the sales/use tax structure favored in-state interests over interstate interests. When "combined with the fact that 93.14% of the 1990 sales would have resulted in use

[32] The analysis of the court below generally tracks this Court's tack in *Travellers'*, where the Court took special note of the *higher* in-state rates prevailing in the largest local jurisdictions. 185 U.S. at 368. *General American* did focus on the average among taxing jurisdictions. But if the parties and the Court had possessed information about the value of property actually subject to each of the rates, it is difficult to believe that it would have disregarded that information in favor of an unweighted average of the rate charged in each local jurisdiction.

taxes either at the same or at lower rates than the complementary sales tax, it is apparent that the tax was designed, and apparently works, *to avoid* discrimination on a statewide basis." *Id.* at 191 (emphasis added).

Given the basic difficulty in impressing a fair and equal share of a consumption tax burden on interstate purchases when sales tax rates vary within the state, there may be some room for debate about the *best* way for the state to proceed. Here, Missouri has selected a rate which is in line with this Court's precedents and far from the margin. Comparing the use tax with the average of the sales tax imposed on all in-state purchases, it is plain that the overall burden of Missouri's tax structure falls more heavily on intrastate than interstate transactions. *Interstate transactions* "as a class" (*Travellers'*, 185 U.S. at 367-68) have not been discriminated against. Nor is the rate (or the overall system) otherwise suggestive of the kind of economic protectionism which the Commerce Clause proscribes. In every respect, the sales-use tax structure adopted by the state exemplifies the "substantially even-handed treatment" for interstate commerce (*Boston Stock Exch.*, 429 U.S. at 332) which the Commerce Clause requires in a compensating tax, while allowing the state to obtain the revenue it is due on goods consumed in the state but purchased outside.

II. THE APPROACH TO EQUALITY OF TREATMENT IN CONNECTION WITH VARYING LOCAL TAX RATES OUTLINED IN *GENERAL AMERICAN* HAS NOT BEEN UNDERMINED BY SUBSEQUENT AUTHORITY

1. Petitioners largely concede that the rule of "absolute equality" which they advocate is inconsistent with the approach to the problem of varying local tax rates reflected in *General American*. They urge that *General American* be overruled as inconsistent with *Halliburton*, 373 U.S. 64, *Maryland v. Louisiana*, 451 U.S. 725, and

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), all of which discuss the principle of equality which is the hallmark of any compensatory tax. Specifically, they argue that *Halliburton* (and the other cases cited) do not admit of an exception for *de minimis* or incidental discrimination. *See* Pet. Br. at 26. We agree. But it has little to do with this case.

2. This case does not ~~involve either *de minimis* or~~ *incidental* discrimination.[33] Missouri's tax structure does not discriminate against interstate commerce at all—at least in any sense previously defined by this Court. In contrast, each of the cases cited by the Petitioners involved a clear (though sometimes small) discriminatory impact on interstate commerce. In each instance, the challenged tax law treated out-of-state transactions *less* favorably than otherwise similar in-state transactions.[34] In *Halli-*

[33] One difficulty with Petitioners' argument arises at the level of precedent. The equality principle did not originate with *Halliburton*. Rather *Halliburton* drew directly from *Silas Mason*. *Silas Mason* expressly relied upon *General American* as illustrating the principle of equality that the Court was adopting. *Silas Mason*, 300 U.S. at 585.

Moreover, *General American* did not endorse tolerance for *de minimis* discrimination. Rather, the Court's only nod to permissible inequality was in the context of the difficult predictive task faced by the state in setting a statewide compensating tax to be measured against taxes established yearly by different localities. 270 U.S. at 373-74. Consistent with the Court's subsequent cases, the Court made clear that a disproportionate burden on interstate transactions would *not* be tolerable if it was either intentional or "a necessary or continuing result of the scheme of taxation adopted." *Id.*

[34] Given the nature of the discrimination on the face of the statutes at issue in each of the complementary tax cases cited by Petitioners, the legislature could simply have revised the tax imposed on the *interstate* side of the ledger, thus creating near-identical treatment of the in-state and interstate transactions, *while still maintaining and effectuating the basic compensatory purpose of the tax*—namely, *equality* as between interstate and intrastate transactions. As shown above, Petitioners' approach to equality

burton, for instance, though the state sales tax was matched by a use tax of an equal amount, the sales tax deducted from the applicable tax base any amount of the price attributable to overhead expenses, while the use tax did not. 373 U.S. at 67. In-state sales were therefore taxed slightly less than comparable out-of-state sales. In other cases cited by Petitioners, exceptions and exemptions made available solely to in-state businesses similarly belied any claim to equality of treatment.[35]

This case is not similar. Here, the feature of the tax law said to create the discriminatory inequality is simply the juxtaposition of a statewide use tax—the tax being challenged—with a *variation* in sales tax within the state. In by far the greatest number of instances—and overall—the rate set by the state leaves in-state transactions *more* heavily burdened than interstate transactions.

3. In each of the cases cited by Petitioners, in-state transactions fared better than out-of-state transactions in some instances, and at least as well as out-of-state transactions in the rest. The *net* effect (of all transactions) was, therefore, that *interstate commerce* was more heavily burdened than *intrastate commerce* by virtue of the tax structure being challenged. *E.g. Boston Stock Exch.*, 429

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in this case would require much more substantial revisions to the state tax structure.

[35] *See Westinghouse Electric Co. v. Tully,* 466 U.S. 388, 404-5 (1984); *Maryland v. Louisiana,* 451 U.S. at 756-60. Petitioner's reliance on *Kraft General Foods, Inc. v. Iowa Dep't of Revenue,* —— U.S. ——, 112 S. Ct. 2365 (1992) is misplaced. The issue presented in that case was under the Foreign Commerce Clause and not the Interstate Commerce Clause. As respects the issue of overall benefit to the state resulting from the tax structure, the Court was careful to note that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce." *Id.* at 2370. Even were it not, it would be difficult to find an analogy between that case and this one.

U.S. at 323-28. Interstate commerce was thus discouraged. Because interstate commerce was being asked to shoulder more than its fair share of the tax burden, the tax system could properly be described as discriminating against interstate commerce, imposing on it an unjust burden, or reflecting an affirmative effort to protect local businesses generally (or some of them) by taxing interstate commerce more heavily.[36]

The same is true of the *non*-tax cases invoked by Petitioners. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* for example, the Court held that a county restriction on importation of out-of-county wastes discriminated against interstate commerce. —— U.S. ——, 112 S. Ct. 2019 (1992). Although the county did not distinguish between out-of-state waste and in-state (but out-of-county) waste, the overall discrimination against interstate commerce could be plainly seen on the state level. The *net* effect of the county ordinance was that, because of the county's policy, *less* interstate waste would flow into the state than would otherwise flow into the state. *Id.* at 2025. The discriminatory effect on interstate commerce was clear. *See also Dean Milk Co. v. Madison, Wisconsin,* 340 U.S. 349, 354 (1951). That overall negative effect on interstate commerce is precisely what is lacking here.

4. In each of Petitioners' cases, the classification established by the statutory scheme offered a concise and clear inequality in treatment, suggestive of protectionism

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[36] As summed up by the court below, "In each of these cases the taxes that were found unconstitutional imposed higher use taxes both on an individual basis and on an average statewide basis. . . . Whether the discrimination against interstate commerce was small or large in dollar amount, it was mandated in every transaction and unmitigated by the structure of the tax." 857 S.W.2d at 191.

and discrimination.[37] The relevant statutes clearly, and (from appearances) purposely, created not only beneficiaries, but also victims—persons engaging in interstate commerce who were, unlike their in-state counterparts, being asked to bear the brunt of the tax. On one side of the classification, some definable in-state industry was specifically favored, or all in-state businesses benefitted by being permitted to take advantage of the provisions at issue; on the other side, similarly situated interstate commerce or specific businesses bore the burden.

In this case, however, out-of-state sellers are *not* victimized by the state tax rate: Petitioners concede that such sellers could not be considered victims of discrimination if the use tax rate matched the sales tax rate. From the vantage point of out-of-state sellers, however, a use tax rate set at the *average* sales tax rate has the same effect. Out-of-state purchasing is encouraged in some instances, and discouraged in others. When the use tax is set at the average sales tax rate, the *net* effect on

[37] In the equal protection context, the Court has been reluctant to define discrimination in a way that would extend to the combined interactions of numerous government bodies; the hallmark of prohibited "discrimination" involves differential treatment between clearly demarcated classes. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), the Court declined to extend exacting scrutiny to a "system that allegedly discriminates against a large, diverse and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts." The difficulty in defining the classification made it difficult to describe the scheme as discriminatory. *Id.* at 24-27. Indeed, the Court was "asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests." *Id.* at 40. The Court noted, however, that "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism. . . ." *Id.* at 41.

out-of-state sellers is a wash, just as it is when the in-state sales tax rate and the use tax rate are the same. Here, of course, the use tax rate is lower.[38]

Beyond the absence of some overall negative effect on interstate commerce, there is nothing in the *structure* of this tax that prejudices any identifiable out-of-state industry in competition with local businesses. That is, the face of the tax evinces no purposeful discrimination against some segment of interstate commerce. Moreover, there is nothing in the record to suggest that, as the tax actually falls, some identifiable out-of-state industry is disadvantaged in relation to some in-state industry—let alone that this was a purpose of the tax structure.

Quite unlike the cases cited by Petitioners, the unevenness of treatment alleged in this case is the product of a complex interlocution of different taxes, state and local, imposed by various governmental units acting independently. It is difficult to describe the product of such independent decisions as "discriminatory" in any previously defined sense.[39] In short, there is no discrimination

[38] From the vantage point of the in-state *purchaser*, there is also no prejudice in the rate. Just as any other purchaser of goods in the state, it can shop around for a tax rate that it finds attractive, whether it be the use tax rate on out-of-state purchases or any of the multitude of rates available within the state.

[39] This Court has inferred discriminatory intent in a statute when its structure and design tends to exclude the possibility of a non-discriminatory purpose—that is, when the discriminatory or protectionist burden placed upon interstate commerce is crisp and manifest. *See Boston Stock Exch.*, 429 U.S. at 330-32. The structure of the tax at issue here evinces the *absence* of a discriminatory purpose or plan.

By contrast, in *Bacchus Imports, Ltd. v. Dias*, there was an obvious effort to exempt a specific local business from a tax. 468 U.S. 263, 271 (1984). The consciously and clearly drawn lines defining the exempt class in *Bacchus* evidenced a clear *purpose* to discriminate against interstate commerce in favor of a local industry. The patchwork of local authority at issue in this case is not similarly suggestive of a discriminatory plan.

against interstate commerce or any identifiable segment of interstate commerce, either in purpose or effect.

The unusual issue of equality presented in this case is largely *sui generis*. It is sufficient here that in dealing with the practical problem presented—where the variation in the in-state rate suggests no protectionist purpose—the rate the state has set is consistent with this Court's cases and the underlying premises of the Commerce Clause. If the state is to meet its compelling need to tax interstate transactions equally, the state can do no better than set a rate that is not higher than the average rate to which in-state sales are subject.[40]

III. THE NOTION OF EQUALITY POSITED BY PETITIONERS IS NEITHER REQUIRED BY THE COMMERCE CLAUSE NOR THIS COURT'S COMMERCE CLAUSE CASES

Although the touchstone of state tax constitutionality under the Commerce Clause is whether the tax discriminates against interstate commerce, "discrimination," as Professor Gunther has explained, "is not a self-defining term." G. Gunther, *Constitutional Law* 25 (12th ed. 1991). Rather, the meaning of that term must vary with the circumstances.[41] As shown above, in the context of determining a constitutionally acceptable tax rate applicable to interstate transactions to complement varying

[40] The Court need not reach the question whether the state must establish a precise way of matching the tax on interstate transactions to each and every in-state transaction when it can easily do so. If interstate transactions can be treated the same as intrastate transactions, the same treatment may be required. But the same tax cannot always be imposed on interstate and intrastate transactions—and this fact is the foundation for the basic principle of complementary taxation.

[41] "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing*, 286 U.S. at 481.

local tax rates, discrimination is defined with reference not to the lowest rate available anywhere in the state, but to the average in-state rate.

Petitioners' argument rests, in contrast, on the postulate that if an individual purchaser or seller involved in interstate commerce is somehow treated less favorably than *some* intrastate purchaser or seller of goods, there is a prohibited discrimination against interstate commerce. Petitioners' *amicus* states that premise directly, telling the Court that the Commerce Clause requires a "bright line test" [42] under which a state must provide interstate commerce with "absolute equality" in "each and every instance." Amicus Br. at 9, 19. In other words, the unsupported premise of Petitioners' and *amicus*' position is that if the use tax is higher than the sales tax that applies to even one transaction within the state, the use tax is discriminatory and impermissible.

That notion of equality, under which interstate commerce is guaranteed "most favored taxpayer treatment" [43]

[42] Although *amicus* states that this view is "clear from this Court's precedents," *amicus* is unable to cite even one case supporting a rule that "absolute equality" represents the constitutional minima. *See* Amicus Br. at 10-16. Moreover, Petitioners and their *amicus* fail to explain *why* such a rule ought to be adopted except to assert that it would provide a "bright line." Amicus Br. at 15; Pet. Br. at 22. A line based on the average in-state rate would be equally bright and more consistent with commerce clause principles.

[43] *See Dep't. of Revenue of Oregon v. ACF Industries, Inc.*, No. 92-74 (January 24, 1994). In *ACF Industries*, this Court made clear that the idea of nondiscriminatory treatment for interstate commerce does not necessarily encompass "most favored taxpayer" treatment. The Court considered a statute under which Congress' definition of discrimination against interstate commerce was at issue. This Court concluded that Congress had mandated equality of treatment for railroads, but had defined the comparison between railroads and other taxpayers so as to exclude from the comparison entities that were entirely *exempted* from the tax in question. That some taxpayers would fare better than the railroads did not necessarily mean that there was "discrimination," at least where

is not supported by this Court's commerce clause cases, and assuredly is not geared to finding an appropriate match to *varying* local tax rates. As explained above, in the unique situation created by varying local tax rates within an otherwise concededly complementary tax structure, the Commerce Clause is satisfied when the rate applied to interstate commerce is no higher than the average in-state rate. That one might find some sales in interstate commerce taxed at a higher rate than some in-state sales does not mean that the tax discriminates against interstate commerce in light of the fact that one can just as easily (and more frequently) find that in-state sales are taxed at a higher rate than interstate sales. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980) ("Legislation that visits *effects* equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn") (emphasis added); *Travellers'*, 185 U.S. at 162. That approach is fully consistent with this Court's stated understanding of discrimination and equality under the Commerce Clause generally. For example, in *Bacchus*, the Court explained that a finding of discrimination does "not depend upon whether one focuses upon the benefitted or burdened *party*. A discrimination claim, by its nature, requires a comparison of the two *classifications*." 468 U.S. at 273 (emphasis added). So long as the state refrains from drawing lines which burden interstate commerce as a class more heavily than in-state commerce, interstate commerce is not discouraged and (at least so long as there is no other discriminatory purpose at play) the objectives of the Commerce Clause have been achieved.

The Court has summed up that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burden-

there was no "singling out." 1994 U.S. LEXIS 1141, *26-27. *See id.* at *28 (Stevens, J. dissenting) (statute "merely protects railroads from discrimination, rather than conferring on them a right to be treated like the most favorably treated taxpayer").

ing interstate commerce." *Amerada Hess Corp. v. New Jersey Div. of Taxation*, 490 U.S. 66, 75 (1989). The tax structure here is not facially discriminatory: there is no line drawn here with in-state commerce, uniformly favored on one side, and interstate commerce burdened on the other. There is no discriminatory intent: the structure of the tax and the rate currently in effect suggests no desire to disadvantage out-of-state businesses. And there is no *undue* burden: interstate commerce is not bearing any greater proportion of the burden than in-state commerce. Whether one focuses on interstate commerce generally, or any identifiable subset of that commerce (in the form of a particular business or industry), each of these prohibited conditions is absent.

Petitioners' approach to discrimination and "absolute equality" rests, in contrast, on a sensitivity to individualized disparities in treatment arguably more appropriate to equal protection than commerce clause cases. The Commerce and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects *interstate commerce*, and the other protects *persons* from unconstitutional discrimination by the States." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (emphasis added; footnote omitted). This is so because the Commerce Clause " 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Gov. of Maryland*, 437 U.S. at 127-28).[44]

In formulating and applying the anti-discrimination principle, the Court has consistently been guided by the

[44] Just as the "antitrust laws . . . were enacted for the protection of competition, not competitors," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), so too was the Commerce Clause designed to protect commerce, not individual commercial entities.

Clause's purpose: to implement the Framers' conviction that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *See Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). The Clause thus ensures that "the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States. . . ." *Wardair Canada, Inc. v. Florida Dep't. of Revenue*, 477 U.S. 1, 8 (1986); *see also Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827).

The focus on the need for unity within the Nation (rather than a desire for some sort of individualized protection for interstate dealers) ultimately accounts for the Court's prohibition on discrimination against interstate commerce. The anti-discrimination principle "follows inexorably" from the basic purpose of the Clause as a barrier to the forms of economic protectionism practiced by the states under the Articles of Confederation. *See Boston Stock Exch.*, 429 U.S. at 329. And indeed, the Court has often stated the test of discrimination in terms of whether the distinction at issue suggests or manifests some form of favoritism for in-state economic interests. *E.g., Clover Leaf Creamery Co.*, 449 U.S. at 471; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523-28 (1935); *BT Investment Managers, Inc.*, 447 U.S. at 35-37. The absence of protectionism either in evident purpose or effect precludes a finding of unlawful discrimination in commerce clause cases.[45]

There is no suggestion on the face of the rate, or in the sales tax-use tax structure, of a plan or intention to

[45] That is why even clear discrimination against interstate commerce will survive constitutional challenge if "justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, —— U.S. ——, 112 S. Ct. 789, 800 (1992) (citation omitted); *Bacchus*, 468 U.S. at 270.

shield in-state industry generally or some particular industry from interstate competition. At the established rate, most in-state sellers continue to be burdened more heavily than out-of-state sellers. While the patchwork of local tax rates in Missouri results in a rate in some areas that is less than the use tax rate, it cannot fairly be described as discrimination against *interstate commerce*, for neither that commerce generally nor any identifiable segment of it is treated less favorably than in-state commerce. When the state draws a line by establishing a tax rate which continues to burden in-state sellers more heavily than out-of-state sellers, interstate commerce does not bear a disproportionate burden of the state tax in question, and interstate sellers are not adversely affected by such rates.

In addressing issues of discrimination, it is axiomatic that "equal treatment" does not always mean the "same" treatment, but rather equally fair or just treatment.[46] In the case of complementary taxes addressed to varying local tax rates, where an exact match is impossible, the state is clearly at pains to be equally fair to interstate commerce when it fixes the rate of taxation on interstate sales at less than the average rate applied to in-state sales. By doing so, the state affords the even-handed treatment (*Boston Stock Exch.*, 429 U.S. at 332) which the Commerce Clause requires.

This case does not present the question whether use of an average in-state rate (or, for that matter, an analysis which weighed the overall burden on interstate commerce against the burden on intrastate commerce) would suffice as a constitutional test of discrimination in every situation. *Compare American Trucking Ass'ns v. Scheiner*, 483 U.S. at 266, 296-97 (1986) (state compelled to use

[46] *Cf. Halliburton*, 373 U.S. at 77 (Brennan, J. concurring) ("if the Constitution does not mandate absolute equality of treatment as between in-state and out-of-state sales, it assuredly does forbid discriminatory treatment by the States").

a more accurate method of apportioning tax) *with Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) (no more accurate means available). A more difficult case might be presented if—despite the fact that on the whole, interstate commerce did not suffer—the statute at issue disadvantaged some identifiable out-of-state industry relative to its in-state counterpart. Such a circumstance would present, at the very least, a colorable basis upon which to argue a protectionist or discriminatory purpose underlying the tax. But, in the absence of any indicia of protectionism, where the claimed unevenness in treatment is a function of varying local tax rates, the average in-state rate provides a suitable reference point for determining whether the state has discriminated against interstate commerce. Nothing in this Court's cases requires that this approach be abandoned. To the contrary, acceptance of Petitioners' approach to "absolute equality" in "each and every instance" would require the adoption of a broad new rule of uncertain scope and implication.

IV. *GENERAL AMERICAN* SHOULD NOT BE OVERRULED

1. Petitioners have asked that *General American* be overruled. As shown above, nothing in this Court's recent cases has undermined the practical approach to the issue of varying local tax rates adopted by the Court in *General American*. But even if it perceived a tension between *General American* and later precedent, the Court ought not overrule *General American*.

2. In commerce clause cases, *stare decisis* has special force, for the issues involved are often ones "that Congress may be better qualified to resolve, . . . [and] has the ultimate power to resolve." *Quill*, 112 S. Ct. at 1916 (footnote omitted). No matter how the Court might "evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. . . . Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." *Id.*

3. In *Quill*, the Court acknowledged that the bright-line approach employed in *Bellas Hess* (386 U.S. 753 (1967)) was inconsistent with more recent cases. Nonetheless, the Court was unwilling to overrule that case. The Court thus retained a *restriction* on state taxing power.

The Court ought to be doubly reluctant to overrule precedent where the effect is to impose new restrictions on state taxing power. The Commerce Clause is not intended and should not be used to "eclipse the reserved 'power of the States to tax for the support of their own governments.'" *Boston Stock Exch.*, 429 U.S. at 328 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 87 (1824)). Respect for state taxing authority and state fiscal needs counsels caution.

4. Moreover, the Court ought to be reluctant to intrude on the allocation of taxing power as between a state and its subdivisions, as the adoption of the rule advanced by Petitioners would likely require. As shown above, the form of inequality about which Petitioners complain is inherent in the State's decision to afford localities taxing power, including the power to set rates to meet local needs. This political allocation of power ought not be disturbed by the Court—at least not without some solid evidence that it actually undermines a core value of the Commerce Clause.

5. *General American* is fully consistent with the modern approach to commerce clause problems. The focus of the *General American* approach is squarely on "economic realities" (*see Complete Auto Transit*, 430 U.S. at 279), "measured in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S. at 70 (footnote omitted). It addresses a particular problem with a logical rule. In contrast, Petitioners' approach would substitute abstraction and formalism—in the form of adoption of one spe-

cific notion of "absolute equality"—for an approach which focuses on the economic realities. Petitioners' proposed rule that a use tax operates unconstitutionally if interstate transactions are taxed at a higher rate than intrastate sales "in some areas," would ignore the central economic reality that in Missouri interstate commerce is actually encouraged by the overall sales tax-use tax structure which Petitioners challenge.

Overruling *General American* in favor of Petitioners' approach would not bring some aberrant rule of law into line with prevailing precedent. Rather, it would establish a new rule and extend the Commerce Clause's anti-discrimination principle far beyond where it has been taken before. At the same time, it would prevent the state from achieving its legitimate end of equalizing the tax burden on the consumption of goods between purchases in and out-of-state. *General American* reflects a logical approach to a specialized problem fully consistent with basic commerce clause principles.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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(13)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Introduction

We will not attempt to respond individually to the five overlapping briefs filed by respondents and their *amici* but will confine our reply to those points most germane to the Court's

consideration of the issues in this case.[1] At the outset, several general observations are in order.

1. The array of state and local taxing units and their trade associations who have lined up in support of the Missouri taxing structure leaves no doubt that state and municipal officials view this case as a potential wedge to pry open the door that has heretofore been shut to any sales/use tax scheme that does not treat local commerce and interstate commerce equally. The briefs of respondents and their *amici* represent an undisguised plea to allow states to experiment with taxing systems that do not achieve true parity between local and interstate commerce.[2]

Until now, a use tax that was not identical to a sales tax imposed on an identifiable corresponding transaction has not passed constitutional muster. Every state except Missouri seems to understand what is required by the Commerce Clause and has taken the steps necessary to make sure that any local use tax is paired with the corresponding local sales tax. Missouri enacted a statute in 1990 which gave each locality the option of enacting a use tax equivalent to any local sales tax (§144.747), but scuttled that arrangement in favor of the mandatory additional use tax

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[1] The Brief of Respondent Janette Lohman will be referred to as "Resp. Br."; the Brief of Intervenors-Respondents DeLong's, Incorporated, *et al.*, as "DeLong Br."; the *Amicus* Brief of The National Conference of State Legislatures, *et al.*, as "NCSL Br."; the *Amicus* Brief of The Multistate Tax Commission as "MTC Br."; and the *Amicus* Brief of the City of St. Louis and eleven other Missouri municipalities as "Cities' Br."

[2] Perhaps the most candid acknowledgment of the true motive of our adversaries appears at page 3 of the *amicus* brief of the Multistate State Tax Commission, where that body states that its mission is "to promote and support appropriate state efforts to innovate and develop more sophisticated and efficient methods of taxing interstate businesses . . .."

enacted at the state level in 1991 for the benefit of local counties and municipalities.[3]

2. Respondents and their *amici* claim that the sovereignty of local governmental units is at stake and accuse petitioners of asking this Court to usurp local electorates' right to impose sales taxes through "local democratic decisionmaking" (NCSL Br. 2; DeLong Br. 24-25). And in seeking this Court's blessing for a system that tolerates wild discrepancies between sales and use tax rates, respondents suggest that "the claimed unevenness in treatment is a function of varying local tax rates" and that equality is "impossible" (DeLong Br. 44, 8). Both arguments are misconceived.

The State of Missouri, not petitioners or this Court, has preempted "local democratic decisionmaking" by imposing the additional 1.5% state-wide use tax for the benefit of local taxing districts, thereby foreclosing voters from even considering the issue of local use taxes. Indeed, one of the apparent purposes for utilizing this mechanism was to obviate a vote of the local citizenry on the use tax, despite the mandate of Article X, §22(a) of the Missouri Constitution requiring local voter approval as a precondition to the levy of any such taxes.[4]

And the "unevenness" in treatment exists precisely because the State has allowed localities to adopt local sales taxes but has

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[3] The now-repealed §144.747 provided: "Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter" (S.L.F. 44).

[4] The General Assembly anticipated a challenge to this disenfranchisement by stipulating in §144.748(9) that the voters would have a chance to consider the additional use tax "... only in the event that a final decision of a court of competent jurisdiction holds that the provisions of this section require voter approval."

arrogated to itself the function of fixing the additional use tax. The State is the architect of its own constitutional predicament and cannot bootstrap itself into the argument that it lacks the ability to create a true "compensating use tax" at the state-wide level and that therefore "'absolute equality' ... cannot be attained" (DeLong Br. 23).

3. The State announces that "No 'better' alternatives have been suggested" (Resp. Br. 28), but Missouri stands alone in its inability to conform its sales/use tax system to the plain dictates of the Commerce Clause. None of the other 28 states that authorize local use taxes allow them to exceed the local sales tax within the same taxing jurisdiction (JA 35, ¶15). Footnote 16 of our opening brief indicates that these other sovereigns deal with the issue either by fixing both the sales and use taxes on a state-wide basis or by requiring them to be linked if and when enacted at the local level. Missouri, having adopted and then repealed such a system, is currently unique in its disregard for traditional notions of sales and use tax parity.[5] But other states and trade groups are obviously waiting in the wings to leap through any loopholes that might lurk in the Court's opinion in this case.

4. Respondents repeatedly protest that use taxes are not "protectionist," but their own articulation of the purpose of use taxes falls squarely within the definition of protectionism. The Missouri Supreme Court has said that the purpose of its use tax is "to protect Missouri revenue and Missouri sellers against competition from out-of-state sellers by removing any advantage which might be gained by making purchases outside the state..." *R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988). Without becoming enmeshed in a definitional debate, we would simply point out that

[5] An Oklahoma sales/use tax arrangement virtually identical to the present Missouri version was declared unconstitutional under the Commerce Clause in *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978).

use taxes are inherently protectionist and *per se* discriminatory. They are not a charge for the use of the state's resources, facilities or services; nor are they exacted as a health or safety measure. Because of their distinctive character and function, use taxes have been upheld *only* when carefully crafted to *equalize* the burden between interstate and local commerce. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581, 586 (1937); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-73 (1984). That is the test the Missouri additional use tax flunks.

5. Respondents concede that there is no *de minimis* exception to the Commerce Clause (Resp. Br. 13; DeLong Br. 33). They also seem to agree that even if such an exception existed, it would be of no benefit to them in this case. Indeed, the additional 1.5% use tax is expected to generate between $60.8 million and $81.1 million in revenues during fiscal year 1994, including about $16 million to $21 million in areas of the state where the use tax exceeds the sales tax (see JA 75 and Petnr. Br. 18). Although respondents repeatedly emphasize that more than 90% of the sales subject to sales tax occur in locales where the sales tax is equal to or in excess of 5.725%, the more telling fact is that 26% of the state's residents live in the 841 taxing districts where the sales tax is less than 5.725% (JA 66, 104, 107). When those 1.3 million Missourians order or buy merchandise from out-of-state, they incur a higher use tax than the sales tax they would pay in their own town on the same items.

In any event, respondents acknowledge that if the Missouri system is deemed discriminatory, it cannot be salvaged on a *de minimis* theory. This concession is, of course, required by this Court's rule that "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).

ARGUMENT

I. THE ADDITIONAL 1.5% STATE-WIDE USE TAX IMPOSED BY §144.748 DISCRIMINATES ON ITS FACE AGAINST INTERSTATE COMMERCE AND CANNOT BE JUSTIFIED AS "COMPLEMENTARY" TO LOCAL SALES TAXES IMPOSED AT DIFFERENT RATES IN DIFFERENT PARTS OF THE STATE.

The issue presented by this case is the constitutionality of §144.748, RSMo. This statute levies a 1.5% use tax over and above the state-wide sales tax and, by anyone's reckoning, therefore discriminates on its face against interstate commerce. A facial analysis of the state statutory scheme thus reveals that this case is nothing more than a functional rerun of *Welton v. Missouri*, 91 U.S. 275 (1875).

If respondents are to salvage the additional use tax under these circumstances, they must bear the burden of demonstrating that the tax is "complementary" to *some* sales tax. Our opening brief anticipated that effort— and responded to the Missouri Supreme Court's analysis of it— in light of the governing decisions of this Court. If this Court is to look for *a tax* that is "complementary" to the 1.5% additional use tax, where is it to be found? Obviously not at the state level. And if the Court looks at the local level, it will find 22 different local sales tax rates around the state ranging all the way from zero in 14 locales to 3.5% in one city (JA 67, 126-31).

Respondents have mischaracterized our discussion of this issue and have attempted to shift the focus from the constitutionality of §144.748 to the constitutionality of sales and use tax arrangements in particular cities and counties. That is not what this case is about. We have not engaged in a "transaction-by-transaction approach," as one *amicus* has labeled it (NCSL Br. 17), but rather have used appropriate examples to demonstrate that the patchwork pattern of varying local sales taxes cannot be deemed "complementary" to the uniform state-wide use tax.

Interstate commerce is not an ethereal abstraction; it takes form in the marketplace where commerce is transacted by real people buying and selling real goods and incurring real taxes. It was, after all, for their benefit that the Commerce Clause was enacted. *Dennis v. Higgins*, 498 U.S. 439, 449 (1991). As long ago as 1938, the necessity of examining the realities of the local marketplace was noted in WARREN & SCHLESINGER, SALES AND USE TAXES: INTERSTATE COMMERCE PAYS ITS WAY, 38 COLUM. L. REV. 49, 66 (1938), quoted with approval by the Missouri Supreme Court in *Southwestern Bell Tel. Co. v. Morris*, 345 S.W.2d 62, 67 (Mo. banc 1961):

> "In order that use taxes will not be held discriminatory against interstate commerce, it must be shown that there is an equivalent burden on the purchase of merchandise *locally*. For that reason, it is necessary to find a tax *on local purchases* supplementary to the use tax."[6]

Seemingly oblivious to the cases from this Court explaining the concept of and justification for "complementary" or "compensatory" use taxes, respondents superficially state that sales and use taxes are "the 'paradigm' of compensatory taxes" (Resp. Br. 27). Ultimately, though, they must recognize that no sales/use tax case has ever accepted their position that a uniform, fixed use tax rate can be deemed to "compensate" for an overall *average* of a hodge-podge of varying sales tax rates. Their argument for a rule based on state-wide "average" tax rates or on an analysis of state-wide "net burdens" is totally without precedent and reflects a misperception of the rationale underlying this Court's endorsement of use taxes that are truly "complementary." *See, e.g., D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32 (1988) (use tax does not discriminate against interstate commerce because "[i]t is *equal* to the sales tax applicable to the same tangible personal property purchased in-state"); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331

[6] Emphasis added here and throughout this brief except where otherwise indicated.

(1977) ("Equal treatment of interstate commerce ... has been the common theme running through the cases in which this Court has sustained 'compensating' state use taxes"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963) ("... [T]he purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a *uniform* tax burden irrespective of whether it is acquired within the State, making it subject to the sales tax, or from without the State, making it subject to a use tax *at the same rate*").

The dictionary definition of "complement" is "to fiil in or make up (what is lacking)"; and "compensate" means "to be equivalent to." *Webster's Third New International Dictionary*, pp. 464, 463 (1967). The use taxes that have been approved by this Court have literally "filled in" and "made up" for the gap created by the presence of a sales tax within the taxing jurisdiction and have supplied an "equivalent" levy. The seminal case of *Silas Mason*, 300 U.S. at 581, underscored the parity achieved between the local seller and his competitor by a truly compensatory tax:

> "One of its effects must be that *retail sellers* in Washington will be helped to compete upon terms of equality with *retail dealers* in other states who are exempt from a sales tax or any corresponding burden."

Later, in describing the complementary nature of the use tax, Justice Cardozo stressed the equal burdens imposed on nonresident goods and local goods:

> "In substance what [Washington] says is this: You may ship your goods in such amounts and at such prices as you please, but the *goods* when used in Washington after the transit is completed, will share an equal burden with *goods* that have been purchased here." *Id.* at 586.

So from the inception of the compensatory use tax doctrine, the equality of burdens on competing sellers and competing goods has been indispensable to validity. The Missouri scheme, which makes no effort to equalize the burden between the

foreign seller and his competing local counterpart or between foreign goods and competing local goods, simply does not involve a complementary tax. Indeed, in localities where more than 26% of Missourians live — a statistic which respondents conspicuously ignore— the 5.725% state-wide use tax exceeds the sales tax rate applicable in the same locale (JA 66); it does not "fill in or make up what is lacking."

Intervenor-Respondents acknowledge that out-of-state purchasing is "discouraged" when the would-be purchaser is confronted with a use tax that exceeds the corresponding sales tax (DeLong Br. 36). But a state has no constitutional power to use its taxing authority to "discourage" out-of-state purchasing. Nor can it discriminate against some segments of interstate commerce and seek absolution by reason of supposed favoritism accorded to other segments.

Use tax cases of a more recent vintage further undermine the State's argument based on "average" overall tax rates. *Halliburton* reinforced the doctrine of *Silas Mason,* re-emphasized the need for equal treatment, and again zeroed in on similarly-situated taxpayers and goods. Rejecting the claim that incidental discrepancies should be overlooked, the Court reiterated the rule that has always governed sales/use tax cases:

> "The conclusion is inescapable: *equal treatment for in-state and out-of-state taxpayers similarly situated* is the condition precedent for a valid use tax on goods imported from out-of-state." 373 U.S. at 70.

The *Halliburton* Court also observed that in determining whether taxes are truly complementary, the inquiry should focus on the "very in-state taxpayer who is most similarly situated ..." to the use tax payer. *Id.* at 71.[7] *Halliburton* discredits the

[7] To the same effect is *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___ U.S. ___, 112 S. Ct. 2365, 2371 n.23 (1992) ("In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are 'most similarly situated.'")

contention (Cities' Br. 15) that use tax payers *as a statewide class* may be compared to sales tax payers *as a statewide class*. The Court's insistence on comparing only the most similarly situated tax payers is inconsistent with respondents' approach, which disregards the dramatic differences in tax consequences flowing to various members of the purported classes. Respondents' global, generic vision of commerce completely depersonalizes the inquiry and violates the principle that "all objects of interstate trade merit Commerce Clause protection...." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

Respondents' reliance on overall rough, average approximations likewise runs headlong into *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the Court used as an example of a truly compensating tax a use tax which imposes a "tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the state." *Id.* at 759. Obviously, goods should be compared to goods against which they are competing, not against goods being sold 200 miles away. For 1.3 million Missouri citizens, goods coming from out-of-state are subject to a higher use tax than the sales tax on goods sold locally, and that difference does not "compensate" for anything.

In *Boston Stock Exchange*, the Court unanimously struck down a state statute labeled "compensatory legislation" enacted to "neutralize" the competitive advantage conferred on business transactions outside the state. 429 U.S. at 330. Because of the tax differential, a given resident purchaser would have received an economic advantage by engaging in a local transaction. Dismissing the argument that the taxes were "complementary," Justice White looked at the choice facing the in-state purchaser and summarized the underpinnings of the "complementary" tax doctrine:

> "In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax *of the same amount*. The taxes treated both transactions in the same manner." *Id.* at 332.

Similarly, in *Bacchus Imports*, 468 U.S. at 268 n.8, the Court once again used language incompatible with respondents' reliance on overall revenues or average tax rates:

> "Our cases make clear that discrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*."

Whether the comparison is between interstate and local sellers, goods, taxpayers or purchasers, there can be no realistic contention that the tax treatment accorded them is "complementary" unless they are similarly situated and treated equally. Adoption of a rule permitting wide fluctuation in sales/use tax differentials at the local level as long as the overall "average" sales tax rate exceeds the "average" use tax rate would encourage the development of taxing schemes that would seriously disrupt the competitive balance that the rule of equality has historically achieved.

Measuring constitutionality by reference to "average" rates is also rife with the potential for abuse and controversy. In the instant case, of course, the "average" use tax rate is fixed by a uniform state-mandated levy. But respondents' theory of "complementary" taxes would also authorize individual taxing districts to adopt local sales and use tax rates that have absolutely no relationship to each other as long as the state "average" sales tax exceeds the state "average" use tax, however calculated.

Aside from the obvious opportunity for bias against interstate commerce facilitated by any scheme based on "average" rates, a comparison between "average" sales tax rates and "average" use tax rates would require the examiner to shoot at a constantly moving target and inevitably would foster creative methods of

calculating those "averages."[8] Since sales and use tax rates are constantly changing, a retroactive constitutional analysis would need to be made every year, thereby inevitably increasing the amount of litigation over the issue. Respondents' characterization of their proposed Commerce Clause test as establishing a "bright line" (Resp. Br. 43) is thus fanciful.

As a variation on their main theme urging a comparison of "average" rates, respondents also repeatedly trumpet the fact that more sales tax dollars than use tax dollars are currently collected state-wide, and they simplistically cling to the view that this somehow proves that the sales/use tax system actually favors interstate commerce. As noted above, this would be accurate and relevant from a constitutional viewpoint only if the taxes being analyzed were truly complementary to each other. This Court has repeatedly explained that a greater tax burden on local citizens does not justify discrimination against interstate commerce unless the taxes are in fact complementary — *i.e.*, they are imposed on "substantially equivalent events." *See ,e.g.*, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984); *Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 588 (1983).

Respondents' invocation of *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), which dealt with a license tax imposed on photographers, does not further their cause. A photographer at a fixed location paid a maximum tax of $25 per year,

[8] For instance, does the "average" sales-tax rate refer to the mean, the mode, the median, or the most prevalent? More taxing districts in Missouri (409) have an overall sales tax rate of 4.725% than any other single rate (JA 124, L.F. 583-91). If the arithmetic mean were calculated by multiplying the number of jurisdictions having each individual rate by their respective rates, the "average" sales tax rate would be less than the 5.725% state-wide use tax. The median sales tax rate among the 1573 Missouri jurisdictions is 5.225% (*see* JA 67, 119-25; L.F. 560-92).

Because respondents' theory would also countenance a wide range of use tax rates, similar disagreements would likely arise about the correct method of calculating the "average" use tax rate.

whereas transient photographers were charged $5 per week. The Court held that the tax did not discriminate against interstate commerce since it applied equally to *all* transient photographers, whether local or from out-of-state. *Dunbar-Stanley* has never been cited in any majority opinion of this Court, did not involve a use tax, and is of little aid to respondents.[9]

Respondents' repeated efforts to dress up their proposed standard of "average" or aggregate tax effects by claiming that Missouri's additional use tax does not place an "undue burden" on interstate commerce are equally unavailing. It is simply wrong to suggest that a tax is not discriminatory or protectionist unless it imposes a statistically "undue burden" on interstate commerce. As summarized in *Amerada Hess Corp v. New Jersey Div. of Taxation*, 490 U.S. 66, 75 (1989), the cases hold that a tax violates the Commerce Clause if, in the disjunctive, "it is facially discriminatory, has a discriminatory intent, *or* has the effect of unduly burdening interstate commerce." A single isolated remark in the "nexus" discussion in *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1913 (1992), to which respondents repeatedly point (Resp. Br. 11, 17-18, 26; DeLong Br. 11-12), certainly did not upset this settled jurisprudence.

We have no quarrel with the general proposition that interstate commerce should pay its own way. But as this Court said in *Nippert v. City of Richmond*, 327 U.S. 416, 433-34 (1946), in words that could have been written for this case:

> "But this does not mean, and the trends do not signify, that the state or municipal governments may devise a tax appli-

[9] In HELLERSTEIN, COMPLEMENTARY TAXES AS A DEFENSE TO UNCONSTITUTIONAL STATE TAX DISCRIMINATION, 39 TAX LAWYER 405, 414-15 n.63 (1986), the author differentiates *Dunbar-Stanley* from sales/use tax cases and points out that the tax at issue there was "... arguably imposed on a nondiscriminatory class of activities ..." and that "the standard of equality to which the Court was holding the complementary levy may have been considerably more relaxed than the standard it would apply when faced with an apparently discriminatory levy."

cable to all commerce alike, which strikes down or discriminates against large volumes of that commerce in order to reach other portions as to which the application of the tax would produce no such consequences or only negligible ones. Other types of tax are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach other."

II. A FINDING THAT THE ADDITIONAL USE TAX IS DISCRIMINATORY ENDS THE CONSTITUTIONAL INQUIRY.

Although intervenors made an effort below to defend the Missouri additional use tax on the basis of "administrative convenience," the State here wisely disassociates itself from any such assertion: "Nor does Respondent here attempt to 'justify' the additional use tax on 'administrative convenience' grounds" (Resp. Br. 14). This concession obviously recognizes the unavailability of such a defense under, *inter alia*, *Halliburton* and *Kraft General Foods*.

Elsewhere in its brief, though, the State maintains that "No 'better' alternatives have been suggested" (Resp. Br. 28). The unstated assumption of this declaration apparently is that if the state-wide use tax is discriminatory, it might be saved if it is deemed the "least discriminatory alternative." *Amicus* Multistate Tax Commission (MTC Br. 16-22) makes a similar point more overtly, arguing for a "balancing test." These contentions erroneously interject concepts designed for evaluating police-power measures into this use tax case.

The standard for analyzing a discriminatory tax law has been succinctly stated by Professor Blumstein:

> "The antidiscrimination principle emerges as one of the few certain precepts in the constitutional review of state taxation legislation ....
>
> "In a tax case, discrimination, by itself, appears sufficient to justify invalidation because other, non-discriminatory

> means of raising revenue or of providing economic incentives are readily available."[10]

Likewise, in *Chemical Waste Management v. Hunt*, ___ U.S. ___, 112 S. Ct. 2000, 2014 (1992), the Court summarized the rule that is particularly apropos of a use tax: "Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."

The Missouri use tax has only two purposes: To protect local merchants and to raise revenue. Unless it does the latter equally, it may not do the former. If a use tax discriminates against interstate commerce, it is by definition not the "least discriminatory alternati· " There is *always* one simple constitutional alternative: el.minate the discrimination. No "balancing" or search for "better alternatives" is necessary or appropriate.

The State's discussion of other "alternatives" eventually dissolves into a complaint that nondiscriminatory "solutions" would "usurp" states' powers to allocate tax burdens within their borders and might result in less tax revenue (Resp. Br. 30-31). A state's power to tax interstate commerce must be exercised within the parameters spelled out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The nondiscrimination prong of *Complete Auto* is the easiest to satisfy — at least in the context of a use tax — and the State should not be heard to complain that compliance with the plain dictates of the constitution is inconvenient or inimical to revenue enhancement.

The State's position that it has done the best it could is difficult to fathom. By repealing the even-handed §144.747 and replacing it with the discriminatory §144.748, Missouri created a

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[10] BLUMSTEIN, SOME INTERSECTIONS OF THE NEGATIVE COMMERCE CLAUSE AND THE NEW FEDERALISM: THE CASE OF DISCRIMINATORY STATE INCOME TAX TREATMENT OF OUT-OF-STATE TAX-EXEMPT BONDS, 31 VAND. L. REV. 473, 512, 518 (1978).

problem that need never have arisen.[11] The 15 states listed in footnote 16 of our main brief have adopted complementary use tax schemes that have produced both the desired revenue and the desired protection of local businesses without crossing the bright line drawn in the sand by the Commerce Clause.[12]

III. *GENERAL AMERICAN TANK CAR CORP. v. DAY*, 270 U.S. 367 (1926), DOES NOT CONTROL THIS CASE.

Fueled by the Missouri Supreme Court's heavy reliance on *General American*, all respondents and their *amici* urge this Court to breathe new life into that decision in the sales/use tax context, where it has been moribund. It is curious that, if *General American* were truly relevant as a use tax precedent or as a complementary tax case, it has not been mentioned in any of this Court's decisions since 1937. In fact, it is not relevant for the reasons already set forth in our principal brief, in the *amicus* brief of the Washington Legal Foundation and in the dissenting opinion of Chief Justice Robertson in the Missouri Supreme Court. Most importantly, *General American* simply was not a

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[11] Nor can Missouri claim that it naively enacted §144.748 in the full expectation that it met constitutional strictures. The fiscal note submitted to the General Assembly in connection with its consideration of the additional use tax warned that the State "anticipates litigation resulting from this proposal" (JA 74).

[12] Though having disavowed any reliance on "administrative convenience," the State suggests in footnote 34 (Resp. Br. 29) that out-of-state vendors would have an increased burden in complying with a nondiscriminatory use tax. We have three observations: (1) No such burdens have overcome the other state systems which pair local sales and use taxes, and interstate vendors are presumably accustomed to complying with such requirements; (2) record keeping, collection and remittance burdens do not constitute a legal defect in a taxing statute, *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62 (1939); and (3) out-of-state vendors required to collect the use tax would have the requisite nexus to Missouri and thus would have access to local sales tax rates, which could be used to ascertain the corresponding (and equal) local use tax rate.

use tax case and was decided before the modern concept of complementary taxes was developed and took on full form. In analyzing the "in lieu" tax at issue there under the "fairness and reasonableness" standards of the Equal Protection Clause, the Court faced a considerably different task than that presented by an allegedly compensatory use tax required to meet the "strict rule of equality" adopted in *Silas Mason* and reaffirmed in *Halliburton*.

The *General American* Court was examining a tax on property, which was not discriminatory on its face. Under those circumstances, a rough equivalence might pass Fourteenth Amendment scrutiny — especially where a determination of precise equality might be difficult. But it requires no special acumen to analyze a use tax to see whether it is equal to a corresponding sales tax for which it is supposed to compensate. There is no room for play in the joints between sales and use taxes — nor should there be. Part of the Court's impetus in *General American* also may have stemmed from the facts (a) that the discrepancy between in-state and out-of-state taxpayers appeared to be transitory because it existed for only one year, and (b) that the non-resident corporations could "opt out" of the tax by becoming domiciled in a parish and paying the local tax.

As Professor Hellerstein has counselled, "The standard of equality that the Court applies to states in evaluating their complementary tax schemes should reflect the level of scrutiny that the Court ordinarily employs for state taxes under the particular constitutional provision at issue." HELLERSTEIN, COMPLEMENTARY TAXES, 39 TAX LAWYER at 463. The author refers to *General American* as an example of "... the broad 'fairness and reasonableness' standard" of the Equal Protection Clause being applied "indiscriminately" to compensatory taxing schemes challenged under the Commerce Clause. *Id.*

The State urges that *General American* should not be overruled or, alternatively, that it be overruled prospectively (Resp. Br. 39-43 & n.48). Neither action is necessary here; *General*

American is simply inapplicable to the Missouri sales/use tax scheme. Indeed, if the decision of the Missouri Supreme Court were to be affirmed, it would be necessary for this Court to overrule, at least in part, *Halliburton* and *Boston Stock Exchange*, among others.[13]

Respondents also rely on *Travellers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902), which involved taxation on shares of stock. Like *General American*, it is from an earlier era when use taxes were an unknown phenomenon. Furthermore, it was examined under then-existing interpretations of the Privileges and Immunities Clause, where a "substantial equality of tax treatment between residents and nonresidents seems to be enough to satisfy..." the constitutional requirements. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, §4.3, p. 176 (1981). The Court observed the differing burdens and tax status as between resident and nonresident stockholders, and the fact that those burdens varied from year to year. It remarked that "absolute equality in taxation can never be obtained. That system is the best which comes the nearest to it." *Id.* at 371. The tax in question was deemed "the nearest" to equality that could be obtained under the circumstances. Such a holding does not reflect Commerce Clause doctrine and, even assuming otherwise, does not authorize mere approximations in the sales/use tax field, where the "nearest" to equality is equality in fact — a readily achievable goal.[14]

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[13] Of course if the Court does decide to overrule *General American*, the State's request that such overruling be prospective only is contrary to *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439 (1991), and *Harper v. Virginia Dep't of Taxation*, ___ U.S. ___, 113 S. Ct. 2510 (1993).

[14] Professor Hellerstein has questioned whether *Travellers'* would be decided the same way today under "... the Court's modern view of the privileges and immunities clause..." which embodies "... a more rigorous standard of scrutiny ...." HELLERSTEIN, COMPLEMENTARY TAXES, 39 TAX LAWYER at 429 n. 173.

IV. PETITIONERS HAVE STANDING TO CHALLENGE THE USE TAX.

The National Conference of State Legislatures, *et.al.*, purport to challenge, as *amici*, petitioners' standing in this Court (NCSL Br. 8-15). Their argument, to the extent it is anything other than a restatement of their position on the merits, rests entirely on a mischaracterization of the issue raised by petitioners. Both here and below, petitioners have made a facial challenge to the Missouri additional use statute (§144.748) in its entirety. *See* Pet. Apdx. A-1; *see also* JA 9; Petnr. Br. 15-22. The suggestion that petitioners have "implicitly conceded" that the additional use tax statute is unobjectionable in certain local jurisdictions (NCSL Br. 11) is inaccurate. And there is certainly no gap or supervening cause in the link between the additional use tax statute and petitioners' injury. The happenstance of what local taxing jurisdictions may do (*see* NCSL Br. 12 n.4) does not alter petitioners' injury and is not an element of their claim.

The 1.5% additional use tax is imposed by state statute and is applicable in every city and county to every interstate sales transaction. So anyone who is required to collect use taxes — as well as anyone who is required to pay them — is injured because the discriminatory feature of the additional use tax renders it invalid on its face in all its applications. Therefore, anyone who has paid a use tax under the present statutory scheme has necessarily paid the offending 1.5% component thereof and has standing to assert its unconstitutionality. Petitioners are plainly within that group, for it was stipulated in the trial court that "Compliance with §144.748 will impose significant economic costs upon AIM's members and Alumax," including "... the payment of such tax...." (JA 34, ¶8).

As purchasers in interstate transactions, Alumax and various members of AIM pay Missouri use tax, including the additional use tax, on tangible personal property purchased outside of

Missouri (JA 33, ¶4). Alumax's monthly use-tax bill runs about $3,000 (*id.* ¶5). Several members of AIM also have standing as out-of-state vendors because they collect and remit Missouri use taxes on sales of personal property made by them from outside Missouri to purchasers within the state (*id.* ¶4). These stipulated facts establish that petitioners have suffered an injury in fact to an interest within the zone of interests protected by the Commerce Clause. *E.g.*, *Boston Stock Exchange*, 429 U.S. at 320 n.3.

CONCLUSION

The Missouri additional use tax imposed by §144.748, RSMo, fails the bright-line test of equality that has been applied in all of this Court's use tax cases. Section 144.748 discriminates against interstate commerce and is therefore repugnant to the Commerce Clause. The judgment of the Supreme Court of Missouri should be reversed.

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March 1994

Supreme Court, U.S.
F I L E D
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OFFICE OF THE CLERK

No. 93-397

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,

Petitioners,

v.

JANNETTE M. LOHMAN, Director of Revenue, and DELONG'S, INC., THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, and THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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29 pp

QUESTIONS PRESENTED

1. When a state imposes a statewide use tax upon *inter*state sales at a rate which, in more than 50% of the state's taxing jurisdictions, is higher than the sales tax rate on identical *intra*state sales, is the resulting discrimination against interstate commerce constitutionally irrelevant merely because in the aggregate the state collects more sales taxes than use taxes?

2. Does *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), validate a state tax scheme which in numerous instances burdens interstate commerce more heavily than intrastate commerce? If so, is *General American* inconsistent with *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Maryland v. Louisiana*, 451 U.S. 725 (1981); and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); and should it be expressly overruled?

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Respondents.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with more than 100,000 members and supporters nationwide. WLF regularly appears before federal

and state courts in a variety of areas, and devotes a substantial portion of its resources to the promotion of economic liberty, free enterprise principles, and a limited and accountable government.

WLF strongly believes that the economic well-being of this country depends on the unrestricted flow of commerce, both interstate and across our nation's borders. WLF is concerned that a discriminatory taxing scheme such as Missouri's additional use tax will encourage other states and local taxing jurisdictions to adopt similar taxing measures which discriminate against and restrict the flow of interstate commerce.

Amicus submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of brevity, *amicus* hereby adopts by reference the Statement of the Case set forth in Petitioners' Brief.

To summarize, Missouri imposes a statewide sales tax upon all sellers for the privilege of selling tangible property or rendering taxable service at retail within Missouri. Mo. Rev. Stat. § 144.020 (1992). Missouri also imposes a statewide use tax on any article of tangible personal property stored, used, or consumed within the state. Mo. Rev. Stat. § 144.610 (1992). Practically, the sales tax burden is imposed upon purchases made within Missouri, and the use tax burden upon purchases made outside Missouri.[1/] The basic sales tax and use tax rates (including the additional levies authorized under the

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[1/] Under Mo. Rev. Stat. § 144.615(2) (1992), all properties purchased in transactions that are subject to the Missouri sales tax are exempted from the use tax; thus the use tax applies only to the properties purchased outside Missouri and subsequently brought into the state for storage, use, or consumption.

Missouri Constitution) are both 4.225 percent. Mo. Const. §§ 43(a), 47(a) (1945, as amended); Mo. Rev. Stat. §§ 144.020, 144.610.

In addition, Mo. Rev. Stat. § 144.748 (1992) imposes a statewide additional use tax of 1.5 percent upon all transactions which are subject to the basic use tax. Thus, the total statewide use tax rate in Missouri is higher than the statewide sales tax rate by 1.5 percent.

Missouri has attempted to justify this blatant discrimination on the ground that local governments have the authority to levy optional local sales taxes and, in some of the taxing jurisdictions in Missouri, the local sales tax rates are equal to or higher than 1.5 percent, resulting in the aggregate sales tax rates equal to or higher than the use tax rate. The state has advanced this rationale despite the fact that, in a substantial number of taxing jurisdictions in Missouri, the local sales tax rates are lower than 1.5 percent, resulting in aggregate sales tax rates lower than the use tax rate.

The central issue in this case is whether the additional use tax, which imposes a heavier statewide tax burden upon purchases in interstate commerce than those in intrastate commerce, is justified simply because local jurisdictions may impose optional local sales taxes, where the statute provides no guarantee that the total use tax rate will be equal to or lower than the aggregate sales tax rates in all instances, and in fact the total use tax rate is higher than the aggregate sales tax rates in a number of taxing jurisdictions in Missouri.

SUMMARY OF ARGUMENT

The Missouri additional use tax impermissibly discriminates against interstate commerce on its face, in violation of the Commerce Clause of the United States Constitution. The discrimination cannot be ignored either because its impact is experienced only in some, but not all, taxing jurisdictions and transactions, or on the ground that the "extent" of discrimination is insignificant. Unlike the "fair apportionment" prong or "substantial nexus" prong, two of the other prongs in the four-part test for constitutionality under the Commerce Clause, articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the discrimination prong does not require examination of "extent." This Court has viewed the issue of discrimination as a matter of dichotomy: Any state tax statute that fails to accord to each and every instance of interstate commerce treatment equal to intrastate commerce has been struck down by this Court under the Commerce Clause. In the present case, the Court could best deal with the issue of discrimination by explicitly embracing the bright line test of absolute equality, the standard that has been applied in these precedents.

The bright line test of absolute equality is not only conceptually sound, as it best reflects the nature of the discrimination prong of the *Complete Auto Transit* test, but also is advisable from a practical standpoint. Contrary to Respondent's and the Missouri Supreme Court's suggestion, statistical data cannot accurately quantify the extent or effect of discrimination in this case or in any other case, and cannot provide a meaningful and reliable test for constitutionality. For example, if the Court allows any *de minimis* exception to the Commerce Clause, the Court would then have to define the *de minimis* level, which decision would inevitably be arbitrary. These conceptual and practical problems can be avoided only by the bright line test of absolute equality (*i.e.*, a state tax statute must accord to each and every instance of interstate commerce treatment equal to intrastate commerce, and cannot impose more burdensome taxes on interstate commerce than intra-

state commerce however slight the extent of discrimination might be). Furthermore, the bright line test will discourage states and local jurisdictions from inventing creative taxing schemes that discriminate against interstate commerce, and will decrease the incidence of constitutional disputes which would eventually occupy this Court's and other courts' time and resources.

ARGUMENT

I. THE ADDITIONAL USE TAX STATUTE IS DISCRIMINATORY ON ITS FACE, AND CANNOT BE JUSTIFIED AS PART OF A COMPLEMENTARY TAX SCHEME

Standing together, the sales tax and the use tax generally form a complementary taxing scheme. While the use tax, standing alone, would appear to discriminate against interstate commerce, this Court has not reviewed a use tax statute "within its four corners," but in conjunction with the same state's sales tax statute. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479 (1931). This Court has upheld the use tax under the Commerce Clause when the sales tax and the use tax imposed equal burdens on interstate and intrastate commerce. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Use taxes have been justified under the Commerce Clause as "complementary" or "in lieu" taxes to sales taxes.

Generally, a "complementary" or "in lieu" tax must be "complementary" not only in its nature,[2/] but also in the actual amount of tax burdens. In cases holding that two different taxes are part of a "complementary" taxing scheme, this Court has again and again emphasized that the actual burdens under the two taxes are equal. In *Gregg Dyeing Co.*, for example, the Court emphasized the

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[2/] *See, e.g., Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (in order to be "complementary," taxes must apply to "substantially equivalent events").

fact that the amount of taxes imposed under the compensating tax was "precisely the same amount per gallon." *Gregg Dyeing Co.*, 286 U.S. at 480. Also in *Henneford*, the Court emphasized with respect to the Washington use tax statute at issue that "[e]quality is the theme that runs through all the sections of the statute." *Henneford*, 300 U.S. at 583. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963), the Court pronounced that "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." In *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981), the Court again concluded: "We need not know how unequal the tax is before concluding that it unconstitutionally discriminates." The examples are numerous. *See* Petitioners' Brief, at 15-22.

Equality, the theme that runs through all truly "complementary" taxing schemes, is precisely the quality lacking in Missouri's additional use tax statute. The unequal treatment effected by the additional use tax is clear on the face of the statute: The additional use tax statute imposes a higher statewide use tax rate than the statewide sales tax rate. Even if the effect of optional local sales taxes were to be considered, the additional use tax statute provides no guarantee whatsoever that the use tax burden will be no greater than the aggregate sales tax burden in all instances. In fact, in a number of taxing jurisdictions in Missouri, the use tax rate is higher than the aggregate sales tax rates; thus interstate purchases for use or consumption within these taxing jurisdictions are subject to a heavier tax burden than comparable intrastate purchases. Commentators described a similar sales/use tax scheme in Oklahoma as "probably the most blatant attempted discrimination against out-of-state purchasers."[3/]

[3/] J. Hellerstein & W. Hellerstein, State Taxation, ¶ 16.10[3] (1992). This description relates to the Oklahoma sales/use tax scheme which imposed a 2 percent sales tax on sales within the state and a 4 percent use tax on sales outside the state.

(continued...)

The discrimination in this case is clear on the face of the statute, and neither Respondents nor the Missouri Supreme Court have denied the existence of discrimination. On the contrary, the majority of the Missouri Supreme Court admitted that: "we acknowledge that the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations." *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.2d 182, 191 (Mo. 1993); Petition, Appendix A ("Pet. App.") at A-16. Nevertheless, the Missouri Supreme Court chose to ignore the facial discrimination, and concluded that the additional use tax statute passed scrutiny under a "practical analysis" or "practical effect" test, because the use tax rate in some jurisdictions and transactions are lower than the aggregate sales tax rate. *Associated Industries of Missouri*, 857 S.W.2d at 192; Pet. App. A-18. Thus, the Missouri Supreme Court concluded that there was no discrimination against interstate commerce on a "statewide basis." *Id.*

In essence, the Missouri Supreme Court's holding and Respondents' arguments in this case are based on the following fallacious assumptions, and *amicus* submits that the Missouri additional use tax statute could be found permissible under the Commerce Clause only by accepting these same assumptions. They are:

[3/](...continued)

The Oklahoma Supreme Court struck down the use tax as repugnant to the Commerce Clause, despite the state's contention that the inequality in the sales/use tax scheme was rectified by the existence of optional local sales taxes. *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278, 1285 (Okla. 1978). The state argued that the higher rate of use tax in that case was merely the legislature's attempt to equalize the interstate tax rate with the greater in-state tax burden and that, if any discrimination existed, it was only a minimal or incidental discrepancy because a large portion of in-state sales were subject to a 4 percent sales tax. *Id.* at 1281. The Oklahoma Supreme Court rejected these arguments, and held the use tax invalid "whether the rate of those municipal taxes be 1%, 2% or 3%." *Id.* at 1285.

(a) A sales/use tax scheme that discriminates against interstate commerce may nevertheless be tolerated under a "practical effect" test, if the impact of the discrimination is not present in each and every instance of interstate commerce, or if the "extent" of discrimination is small; and

(b) The "extent" of discrimination can be ascertained through an examination of statistical data and will provide a meaningful and reliable test for determining whether the discrimination is constitutionally significant.

Both of these assumptions are without support in this Court's Commerce Clause jurisprudence, and will lead to a number of conceptual and practical problems. *Amicus* will examine these two assumptions in turn.

A. The Commerce Clause Requires Absolute Equality in the Treatment of Interstate Commerce in Each And Every Instance

The first fallacious assumption has been explicitly articulated by Respondent Lohman as well as by the Missouri Supreme Court, which insisted on examining the discrimination on a "statewide basis." *Associated Industries of Missouri*, 857 S.W.2d at 192; Pet. App. at A-18. Realizing that the additional use tax statute in issue could not pass constitutional scrutiny under this Court's precedents, *e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); and *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), Respondent Lohman has attempted to distinguish the present case on factual grounds:

> The critical factual distinction between the present case and *Halliburton*, *Maryland v. Louisiana*, *Bacchus*, and *Armco* is that in each of these cases the particular aspect of the sales or use tax under examination operated in a discriminatory manner *each and every instance* in which it applied.

Respondent Lohman's Opposition to Petition for Writ of Certiorari ("Opposition"), at 10 (emphasis added). Thus, Respondent has urged the Court to examine the "overall effect" of the Missouri additional use tax statutes, as the majority of the Missouri Supreme Court did. *See* Respondent Lohman's Opposition, at 14.

Contrary to Respondent's assertion, however, it is clear from this Court's precedents that, in order to be found unconstitutional, a statute does not have to discriminate against interstate commerce in each and every instance; rather, in order to be found constitutional, a statute must provide an equal treatment to interstate commerce in each and every instance. As discussed more extensively in Petitioners' Brief, a discriminatory tax burden is not offset, nor does it lose its significance, by nondiscriminatory treatment of other instances of interstate commerce, and this Court has struck down state tax statutes despite the allegedly small scale of their discriminatory impact. *See* Petitioners' Brief, at 15-25; *see also Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).[4/]

[4/] In *Boston Stock Exchange*, the New York transfer tax on securities transactions allowed: (i) a 50 percent reduction in the tax rate when the sale was made within New York by a nonresident; and (ii) a $350 limit on the total tax liability for a single sale when the sale was made within New York, by a resident or nonresident. Sales made outside New York were subject to the regular rate of tax, computed by the number of shares involved. *Boston Stock Exchange*, 429 U.S. at 323-325.

Clearly the discrimination did not affect *each and every* instance of interstate commerce. For example, in the case of a resident, the discrimination did not affect transactions involving small numbers of shares, because the $350 limit would not be triggered unless the sale involved a large enough number of shares. In the case of a nonresi-

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Respondent's "each and every instance" or "*de minimis*" type argument would turn the entire Commerce Clause jurisprudence on its head. This Court has repeatedly rejected similar attempts, and there is no reason why Missouri's discriminatory tax should be treated differently.[5/]

The Missouri Supreme Court's error in this case is based on its fundamental misunderstanding of the concepts of "discrimination" and of the "practical analysis" or "practical effect" test under the Commerce Clause. The Missouri Supreme Court insisted on applying a "practical analysis" or "practical effect" test, rather than a "formalistic and exacting approach," citing *Trinova Corp. v. Michigan Dept. of Treas.*, 498 U.S. 358 (1991), and *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). *Associated Industries of Missouri*, 857 S.W.2d at 191-192; Pet. App. A-17-18. While a brief examination of *Trinova* and *Quill* will show that these cases were cited completely out of context, a more careful analysis will help to explain how the Missouri Supreme Court fundamentally misunderstood the meaning of "discrimination" under the Commerce Clause, as well as how the concept should be interpreted in this case.

[4/](...continued)
dent, the New York Court of Appeals observed that there was no discrimination against interstate commerce in favor of intrastate commerce, because New York sales by nonresidents also involved interstate commerce. *Id.* at 333. This Court flatly rejected that contention, noting: "Although it did not so state, the Court of Appeals apparently believed that such discrimination was permissible under the Commerce Clause. We disagree with the Court of Appeals with respect to both residents and nonresidents." *Id.*

[5/] *Amicus* does not believe that the discriminatory impact of the additional use tax is *de minimis*. However, even if the impact of the statute were *de minimis*, such a fact should be irrelevant as a matter of law.

Trinova involved Michigan's single business tax, which was imposed on a taxpayer's total value added that was apportioned to Michigan based on a formula provided in the statute. The taxpayer in that case challenged Michigan's formulary apportionment under the Due Process Clause and the Commerce Clause. *Quill* involved North Dakota's attempt to compel out-of-state mail-order houses to collect and pay a use tax on goods purchased for use in the state, when such mail-order houses had neither outlets nor sales representatives in North Dakota.

Trinova and *Quill* did not primarily involve the issue of discrimination. Rather, in *Trinova*, the primary issue was whether Michigan's formulary apportionment resulted in "fair apportionment," as required in the four-prong test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).[6/] Thus, *Trinova* involved the fair apportionment issue, a different prong of the *Complete Auto Transit* test.[7/] The principal Commerce Clause issue in *Quill* was the concept of "substantial nexus," which is another prong in the *Complete Auto Transit* test. Unlike the present case, neither case involved the discrimination prong of the *Complete Auto Transit* test.

Trinova and *Quill* illustrate the kind of constitutional scrutiny this Court applies when considering the fair apportionment prong and the substantial nexus prong of the *Complete Auto Transit* test, respectively. In *Trinova*, this

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[6/] The four prongs in the *Complete Auto Transit* test are: (i) substantial nexus between the taxing state and the taxed activity, (ii) fair apportionment, (iii) no discrimination against interstate commerce, and (iv) fair relationship between the tax and the services provided by the state. *Id.*

[7/] While the taxpayer in *Trinova* also alleged that the apportionment formula discriminated against interstate commerce, *Trinova*, 498 U.S. at 384, that claim obviously depended on the fair apportionment issue. Because the Court found the apportionment formula valid and the taxpayer could not point to any facial discrimination in the statute, this claim was rejected. *Id.* at 384-386. In contrast, the Missouri additional use tax statute in this case is facially discriminatory.

Court observed that the nature of the fair apportionment prong test is informed by the original rationale for apportionment of income. Apportionment of income becomes necessary because of the difficulty of identifying the geographic source of the income earned by a multistate enterprise with any precision. Therefore, the Court noted that allocating income among various taxing jurisdictions "bears some resemblance . . . to slicing a shadow." *Trinova Corp.*, 498 U.S. at 373-374 (citing *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-121 (1920); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 192 (1983)).

Because it is the lack of precision and certainty that necessitates formulary apportionment in the first place, formulary apportionment is inherently arbitrary; there is no "precise" or "right" answer. In principle, all apportionment formulas are to some degree arbitrary; in practice, some apportionment formulas are more arbitrary than others. Fairness of apportionment is not a matter of black and white, but many different shades of gray. In the fair apportionment prong, no bright line test of constitutionality can be established or applied. Therefore, the Court strikes down an apportionment formula only when it fails to satisfy absolute minimum tests of rationality.[8] The apportionment formula in *Trinova* passed muster under

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[8] In the fair apportionment prong cases, the Court applies the "internal consistency" and "external consistency" tests to ensure that the apportionment meets a minimum level of rationality. The internal consistency test is satisfied if the formula, if applied by every jurisdiction, would result in no more than all of the unitary business's income being taxed. The external consistency test is satisfied if the factors used in the apportionment formula actually reflect a reasonable sense of how income is generated. *Trinova*, 498 U.S. at 380 (citing *Container Corp.*, 463 U.S. at 169). In order to prevail on the external consistency challenge, a taxpayer must prove by clear and cogent evidence that the income attributed to the state under the formula is in fact "out of all appropriate proportions to the business transacted . . . in that State," or "led to a grossly distorted result." *Trinova Corp.*, 498 U.S. at 380 (citing *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 274 (1978)).

these tests. Furthermore, the formula advanced by the taxpayer was not demonstrably less arbitrary than the state's formula. *Trinova*, 498 U.S. at 377. It was in this context that this Court stated that the Constitution "does not require a formalistic analysis resulting in a penalty for Michigan's selection of an easier calculation method for its taxpayers." *Id.*

The concept of "substantial nexus" at issue in *Quill* is somewhat different. On the one hand, unlike the "fair apportionment" concept, "substantial nexus" presents a real dichotomy at its two extremes: at one extreme, the relationship between the taxing state and the taxed activity is so extensive that the nexus is clearly substantial; at the other extreme, the relationship is nonexistent or so minimal that the nexus is clearly not substantial.[9] On the other hand, in the cases between these two extremes, the substantiality of nexus is a matter of degree, just like the "fair apportionment" concept. Thus, substantiality is a matter of black and white at two extremes of the spectrum, but with many shades of gray in between. In the substantial nexus prong, a bright line test *can* be established and applied, because the issue is a matter of black and white at its extremes; but such a bright line test inevitably carries some artificiality and arbitrariness, because the line is drawn at one point on the spectrum.

In *Quill*, this Court rejected the state's suggestion to abandon the bright line test established in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which held that a state may not impose a duty to collect use taxes on a seller if the seller's only connection with customers in the taxing state is by common carrier or the United States mail. *Quill*, 112 S.

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[9] For example, if the taxpayer is physically present on a permanent basis, has assets and employees, and conducts business within the state, the nexus would be clearly substantial. In contrast, if the taxpayer has no relationship or contact whatsoever with the state (not even through common carrier, telephone, or the United States mail), the nexus clearly would not be substantial.

Ct. at 1914.[10] While the Court rejected the "formalistic" approach in older Commerce Clause cases,[11] the Court noted: "not all formalism is alike. . . [T]he bright line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause." *Id.* Therefore, the Court reasoned:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges. . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning these taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959).

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[10] When the Court first established this rule in *National Bellas Hess*, it was not clear whether the rule was based on the Due Process Clause or the Commerce Clause. In *Quill*, the Court examined the evolution of its Due Process jurisprudence since *National Bellas Hess* and, to the extent that its prior decisions have indicated that the Due Process Clause requires physical presence in a state for the imposition of a duty to collect a use tax, overruled those holdings as superseded by developments in the law of due process. *Quill*, 112 S. Ct. at 1911. However, the Court refused to abandon the bright line rule in *National Bellas Hess* for purposes of the Commerce Clause test. *Id.* at 1914.

[11] *Freeman v. Hewit*, 329 U.S. 249 (1946), and its progeny distinguished, for example, between "direct" and "indirect" taxes on interstate commerce.

Id.[12]

In contrast to the fair apportionment and substantial nexus prongs, the discrimination prong involved in this case presents a pure dichotomy. Discrimination means a lack of equality. For purposes of the Commerce Clause, *either* the statute discriminates *or* it does not discriminate: There is no middle ground. Discrimination in the Commerce Clause is a matter of black and white, without shades of gray in between.

In the discrimination prong, therefore, the only test that reflects the nature of the issue, the only test that is not arbitrary is a bright line test with the line drawn between black and white. If the Court has retained the bright line rule of *National Bellas Hess* because of the inherent benefits of such a rule, despite the risk of "artificiality" in the substantial nexus prong, there is much more reason to apply a bright line rule in the discrimination prong, where the only rule that is not arbitrary is a bright line test. Indeed, failing to recognize a bright line rule of absolute equality would lead to artificiality and arbitrariness.

The bright line test of absolute equality not only is conceptually sound, but also will further the ends of the Commerce Clause. Like the bright line test sustained in *Quill*, it will provide "precise guides to the States in the exercise of their indispensable power of taxation." *Quill*, 112 S. Ct. at 1915. As this Court has noted, providing

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[12] The Missouri Supreme Court clearly cited *Quill* out of context. In discussing the evolution of its Commerce Clause jurisprudence over the years, this Court noted that it renounced the formalistic distinction between "direct" and "indirect" taxation on interstate commerce so that taxes with the same economic effect would not be treated differently under the Constitution simply because of the "magic words or labels" attached to them. It was in this context that this Court cited *Complete Auto Transit* for the importance of looking past the formal language of the tax statute to its practical effect. *Quill Corp.*, 112 S. Ct. at 1912. However, as the Court noted in *Quill*, it is clear that "not all formalism is alike," and the Court ultimately sustained the bright line test of *National Bellas Hess*. *Id.* at 1914.

precise guides to the states is especially important in the sales and use tax area, which is at issue in this case:

> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.

Id. (fn. ref. omitted). A failure to acknowledge this rule, in contrast, would result in more confusion and controversy regarding application of the discrimination prong of the *Complete Auto Transit* test.

This Court has in fact applied a bright line test of absolute equality in its precedents, both before and since the *Complete Auto Transit* decision. By explicitly acknowledging and adopting the bright line test of absolute equality which has been already established by this Court (*i.e.*, a state tax statute must accord to each and every instance of interstate commerce treatment equal to intrastate commerce, and cannot impose more burdensome taxes on interstate commerce than intrastate commerce, however slight the extent of discrimination might be), this Court would put to rest any misguided conceptions regarding the meaning of "discrimination" and any attempts by states and local taxing jurisdictions to evade the Commerce Clause through creative taxing schemes.

B. Statistical Data Cannot Accurately Quantify The Extent of Discrimination, and Cannot Provide a Meaningful and Reliable Test for Constitutionality

The second fallacious assumption underlying the Missouri Supreme Court's analysis is that the extent of discrimination could be ascertained with reasonable accuracy based on statistical data, and could provide a meaningful and reliable guide for determining the constitutionality of the statute. In fact, however, statistical data and information that would inevitably be utilized in determining the extent of discrimination are inherently ambiguous and susceptible to misinterpretation, and would not provide a reliable test for constitutionality.

A good example of the misuse or misinterpretation of statistical data is found in the Missouri Supreme Court majority's reasoning. The record in this case shows that, in the calendar year 1990, 841 out of 1,573 taxing jurisdictions in Missouri (53.5 percent) had local sales tax rates below 1.5 percent, and 26.5 percent of Missouri's total population lived in these 841 taxing jurisdictions. The record further shows that 6.86 percent of the taxable intrastate sales occurred in these 841 jurisdictions, yielding 2.76 percent of the total sales taxes collected in the state. *Associated Industries of Missouri*, 857 S.W.2d at 185, Pet. App. A-5.

From this data, the majority of the Missouri Supreme Court jumped to the conclusion that only 6.86 percent of the taxable intrastate sales would have been subject to a sales tax rate less than the use tax rate. *Id.* at 191; Pet. App. A-16-17. However, as Chief Justice Robertson of the Missouri Supreme Court pointed out in his dissenting opinion, this case is an attack on the *use* tax. *See* Pet. App. A-26. Therefore, it is irrelevant what percentage of *intrastate* sales occurred in those jurisdictions with local sales tax rates below 1.5 percent. *Id.* While the amount and percentage of the total *out-of-state* purchases in those jurisdiction may be a better indicator of the extent of discrimination, the record in this case provides no basis from which to calculate these numbers in 1990. *Id.* Moreover, even if these numbers were available, they would essentially be irrelevant because they relate to the purchases in 1990, before the additional use tax came into effect.[13/]

Furthermore, even if the amount and percentage of interstate purchases after the effective date of the additional use tax statute were available, they would by no

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[13/] The additional use tax became effective as of July 1, 1992.

means reflect the actual impact of discrimination. The *actual impact* of discrimination could be measured not by comparing the amounts of interstate and intrastate purchases, but by the actual economic impact which the discriminatory tax had on the purchasing decisions of consumers (*i.e.*, whether to buy interstate or intrastate). This impact is impossible to measure. Even if the numbers showing the amounts and percentage of interstate and intrastate purchases during the periods before and after the effective date of the additional use tax were to be obtained, such figures would not show the *actual impact* of the discriminatory tax, unless *all factors* affecting purchase decisions (other than the tax burden factor) could be identified *and* neutralized.[14/]

Assuming, *arguendo*, the actual impact of the discriminatory tax could be ascertained, such figure would not answer the very question for which the quantification was attempted in the first place, *i.e.*, whether the extent of discrimination is *de minimis*. In order to answer this question, the Court would have to: (i) decide where the *de minimis* line is to be drawn, and (ii) then apply the *de minimis* line test.

Establishing a test based on a "*de minimis*" level of discrimination would be akin to establishing a bright line test but without the bright in the line since what is *de minimis* is always open to question. Thus, the Court will be forced to draw a line one way or another; when the Court does not adopt the test of absolute equality, however, the line will be unclear, arbitrary, and without support in the Commerce Clause. Arbitrariness may be acceptable where no bright line test is possible (as in the case of the

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[14/] Furthermore, the impact of such other factors would be legally irrelevant. In *Boston Stock Exchange*, for example, this Court rejected the New York Court of Appeals's reasoning that higher transfer taxes on New York residents upon out-of-state sales of securities than in-state sales would have no "practical" effect since "it is more than likely . . . that the sale would be made on a New York exchange in any event." *Boston Stock Exchange*, 429 U.S. at 333.

fair apportionment prong) or where a bright line test inevitably carries arbitrariness and artificiality (as in the case of the substantial nexus prong). In addressing the discrimination prong, however, the bright line test of absolute equality not only is possible but also is devoid of arbitrariness and artificiality; therefore, arbitrariness is not acceptable. *Amicus* submits that only the bright line test of absolute equality would be devoid of arbitrariness and administrative problems, and would best reflect the nature of the discrimination prong of the *Complete Auto Transit* test.

Assuming further that a *de minimis* line could be determined and somehow justified, the application of such a line would raise another problem. Statistical data can and does change over time. Thus, using statistical figures as the measure of constitutionality would result in the anomaly of changing the constitutionality (thus, the enforceability) of a statute each year, or even each quarter or month, as the numbers have changed and will change.[15/]

In sum, any attempt to quantify the "extent" of discrimination resulting from the additional use tax, and indeed any attempt to draw constitutional conclusions from statistical data, would be essentially futile. Such inquiry is bound to reach a wrong answer because it started with a wrong assumption, *i.e.*, that the "extent" of discrimination can be quantified and is relevant under the Commerce Clause.

[15/] The record in this case shows that, as a matter of fact, local sales taxes in some jurisdictions were temporarily imposed and then expired by the passage of time. Joint Appendix, Stipulation Exhibit J. Both the number of taxing jurisdictions imposing local sales taxes and the local sales tax rates are subject to change. Thus, as long as the "extent" of discrimination, as the Missouri Supreme Court understands it, remains a relevant inquiry, this Court and other courts would be forced to shoot at a constantly moving target.

II. THIS COURT'S DECISION IN *GENERAL AMERICAN* DOES NOT JUSTIFY MISSOURI'S DISCRIMINATORY ADDITIONAL USE TAX STATUTE AND, TO THE EXTENT IT CAN BE INTERPRETED AS SUPPORTING THE ADDITIONAL USE TAX STATUTE, IT SHOULD BE OVERRULED

It has been suggested by Respondents and the Missouri Supreme Court that the additional use tax may be justified by this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). As pointed out in Chief Justice Robertson's dissenting opinion in the decision below, *General American* does not govern the outcome of this case because it involved the application of the Equal Protection Clause rather than the Commerce Clause, and involved a property tax rather than a sales/use tax scheme. *See* Pet. App. A-27-30. However, if and to the extent that *General American* is interpreted as suggesting that a discriminatory taxing statute does not violate the Commerce Clause if it discriminates against interstate commerce in some but not all instances or if the "extent" of such discrimination is small, the case should be overruled.

Contrary to the Missouri Supreme Court's suggestion, Pet. App. A-13, *General American* is not *the seminal* case of the "complementary" or "in lieu" tax doctrine. The "complementary" or "in lieu" tax doctrine was recognized as early as the 19th century. *See, e.g., Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1868). It has been more clearly articulated in *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), and *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937). *Henneford* is considered the classic example of the "in lieu" tax doctrine in the sales/use tax area. *See, e.g.*, J. Hellerstein & W. Hellerstein, State Taxation, ¶ 16.10[1]. Other than in *Henneford*, *General American* has been cited by very few Supreme Court decisions,

usually in string citations and always for propositions unrelated to the issue in this case.[16/]

Reviving *General American* in the context of this case would be perceived as an open invitation to the states and local taxing jurisdictions to devise creative taxing schemes in an attempt to evade the Commerce Clause. States could be led to believe that they may generally be able to justify discriminatory taxes simply by exempting some instances of interstate commerce from the discrimination, or by hiding behind local jurisdictions. The potential for such misinterpretation would not be limited to the sales/use tax area, but would breed confusion and uncertainty, and therefore more litigation, in the discrimination prong of the Commerce Clause in general. Thus, reviving *General American* will not only restrict and harm the flow of interstate commerce, but also will divert more time and resources of this Court and other courts, states, and taxpayers into needless constitutional disputes.[17/]

[16/] *General American* has been cited for propositions that a state may apply different modes of tax assessment unless they produce inequality on persons or property of the same class, *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 190 (1945); and that a state may impose taxes upon the instruments of interstate commerce (such as rolling stock) and those who are engaged in interstate commerce under its general tax system, *Nashville, Chattanooga & St. Louis Railway Co v. Wallace*, 288 U.S. 249, 267 (1932); *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 493 (1932); and in the Equal Protection Clause context, *Gregg Dyeing Co.*, 286 U.S. at 482; *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 283 (1932); *Salomon v. State Tax Commission of New York*, 278 U.S. 484, 491-492 (1929).

[17/] In their Opposition to the Petition for Writ of Certiorari ("Opposition"), Respondents-Intervenors suggested that administrative convenience justifies the Missouri additional use tax scheme. Respondents-Intervenors' Opposition at 19-23. However, judicial economy should also be taken into account in considering administrative convenience. The increased confusion and room for controversy that will be caused by upholding the additional use tax in this case does not warrant the conclusion that the concern for administrative convenience supports the additional use tax.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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No. 93-397

In The

Supreme Court of the United States

October Term, 1993

ASSOCIATED INDUSTRIES OF MISSOURI, *ET AL.*,

Petitioners,

v.

JANETTE M. LOHMAN,
DIRECTOR OF REVENUE, *ET AL.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Missouri

AMICUS CURIAE BRIEF OF MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is Missouri's statewide, uniform local government use tax law consistent with the Commerce Clause of the United States where it (i) was not adopted as a measure of "economic protectionism"; (ii) was, in part, enacted in response to the concerns expressed by this Court in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) in an effort to eliminate potential use tax compliance burdens on interstate marketers in 1,573 political subdivisions; (iii) discriminates, if at all, in a *de minimis* degree against interstate commerce; and (iv) has no other reasonable alternative to solving the State's legitimate interests?

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AMICUS CURIAE BRIEF OF MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE MULTISTATE TAX COMMISSION

The Multistate Tax Commission ("MTC" or "Commission") is the official administrative agency

of the Multistate Tax Compact ("Compact"). Currently, the Compact has been entered into by nineteen states and the District of Columbia as full members; and thirteen additional states have joined the Commission as associate members.[1] The stated purposes of the Compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

As reflected by these four basic principles, the Commission possesses vital and continuing interest

[1] The current full members are the states of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the states of Arizona, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee and West Virginia.

in those state tax issues that may affect the administration of state tax systems. In particular, the Commission supports those efforts by the states that seek, either individually or jointly, to facilitate taxpayer convenience in complying with state registration, collection, and remittance requirements under their income and sales and use tax laws.

The Commission also abides by another critical principle that is correlative to its four stated principles – the preservation of our federalist form of government. The issues contained in this case, therefore, touch upon the Commission's overall responsibility to promote and support appropriate state efforts to innovate and develop more sophisticated and efficient methods of taxing interstate businesses conducting activities within their jurisdictions. The Commission perceives Missouri's adoption of § 144.748, RSMo. Supp. (1991) as representing, in substantial part, that state's effort to avoid the unreasonable burdening of interstate commerce that was of concern to this Court in *National Bellas Hess v. Department of Revenue of Ill.*, 386 U.S. 753 (1967). Those concerns were repeated in *Quill Corp. v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904 (1992), and played a major part in the Court's recognition of a bright-line, physical presence test for Commerce Clause purposes in the use tax/mail order context.

SUMMARY OF ARGUMENT

At issue here is Missouri's effort to bring closer to parity the sales and use tax rates imposed on interstate and intrastate sales, while, at the same time, reducing the compliance burdens on interstate businesses that are associated with the collection of local government use taxes. In *Bellas Hess* and *Quill*, this Court was clearly concerned with the complexity faced by interstate mail order sellers in complying with state and local governmental use taxes nationwide. While this complexity is nowhere near the level that the mail order industry representatives portrayed in *Quill*, it remains to be appropriately addressed by the states. Despite the references to the "Nation's 6,000-plus" taxing jurisdictions, a statistic upon which this Court heavily relied in *Quill*, a closer analysis of the laws of all sales/use tax states shows that even a mail order company with nationwide use tax collection responsibilities would have to file only one return in 40 states and fewer than 200 in the remaining seven with state and/or local sales taxes.

Missouri's effort to bring parity to the taxes imposed on intrastate and interstate sales was to apply a uniform use tax rate to all units of local government. For the reasons set out below, this simplified method of calculating the local use tax should be upheld against any type of Commerce Clause challenge. This is especially critical given the fact that Congress has yet to pass any legislation that addresses the huge use tax problem that has arisen in the mail order context.

ARGUMENT

I. MISSOURI'S USE TAX SYSTEM DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

A. The Local Use Tax Compliance Burden and Missouri's Response

In 1991, the Missouri General Assembly found its sales and use tax system as substantially favoring out-of-state sellers over its in-state retailers. Prior to the adoption of § 144.748, RSMo. Supp. (1991), the Missouri law provided for a uniform statewide sales tax rate of 4.225%, a uniform statewide use tax rate of 4.225%. While authority was delegated to each local government to impose additional local sales taxes on sales made within its jurisdiction, no corresponding or complementary local government use tax was authorized. Thus, under the tax system existing prior to the enactment of § 144.748, "these permissive sales tax statutes resulted in an aggregate sales tax rate higher than 4.225 percent in the vast majority of counties and municipalities in the state, while the use tax on similar transactions made outside the state remained at 4.225 percent." *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.2d 182, 185 (Mo. *banc* 1993) (Pet. for *Writ of Certiorari*, Appendix A at 3-4). In most instances, therefore, purchasers of goods from an in-state retailer were required to pay more in total state and local sales taxes than purchasers buying from out-of-state mail order and other remote sellers, irrespective of whether such out-of-state sellers had nexus with Missouri,

because no local use tax existed to complement the local sales tax. In its effort to address the discrimination against its in-state retailers, the Missouri General Assembly eventually enacted a statewide use tax at the uniform rate of 1.5% to be collected by the state and distributed to the local governments in proportion to the amount of sales taxes imposed in the respective local jurisdictions.

The Missouri General Assembly could have elected in 1991 to correct the discrimination against in-state retailers by delegating to its local governments the power to impose and collect on interstate transactions a local use tax at a rate equivalent to the local sales tax rate applied in the respective local government jurisdiction. In fact, as originally introduced, H.B. 960 set that very course. If H.B. 960 had become effective, mathematical precision would have been achieved; but, all sellers required to collect local use taxes would surely have complained of an undue burden being placed upon interstate commerce arising from the need to track potentially differing local use tax rates throughout the 1,573 local jurisdictions possessing authority to levy sales taxes.

In an effort to reduce administrative burden, the Missouri General Assembly enacted legislation that protected out-of-state sales transactions from all burdens associated with identifying the local taxing jurisdiction(s) into which goods are delivered and of tracking the applicable local use tax rates in those jurisdictions. To provide this protection, the statewide uniform local use tax rate was

enacted. Under the legislation, out-of-state sellers having nexus in Missouri or otherwise collecting Missouri transactional taxes on their sales destined for Missouri residents would have to apply only one tax rate – 5.725 percent – to all of their taxable sales. For filing and remittance purposes, only one state form was required to be completed; no geographical accounting with respect to the 1,573 local jurisdictions was required; and payment of the state and local use taxes was made to one place – the Missouri Department of Revenue, which was then responsible for distributing the local use tax portion to the local governments. See, § 144.748. In application, the Missouri Supreme Court found upon stipulated facts that under the new legislation –

> "93.14 percent of all taxable sales made in Missouri were subject to an aggregate [state and local] sales tax rate of 5.725 percent or higher. Of those sales, 55.32 percent were subject to an aggregate sales tax rate in excess of 5.725 percent, with some aggregate sales tax rates as high as 7.5 percent. However, 6.86 percent of the taxable intrastate sales were subject to a sales tax rate less than 7.725 percent . . . ". *Id.* at 185.

The statistical fact most telling of all, however, is that found by the trial court when it concluded that "[i]t is apparent to the Court, and the Court so finds and concludes, that intrastate sales in Missouri in the calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated

by application of a uniform sales [use] tax rate of 1.5% in all locales." See Petition for *Writ of Certiorari*, Appendix B at A-38, fn. 1 (emphasis added). This conclusion alone demonstrates that, in practical effect, Missouri's newly adopted use tax system did not discriminate against interstate transactions; and that it retained, albeit to a lesser degree, its rate bias against in-state sales transactions.

B. The Missouri General Assembly Has Addressed the Concerns That This Court Relied Upon for its Decisions in *Bellas Hess* and *Quill*

In *Bellas Hess* and *Quill*, the majority of the Court was concerned with the administrative burdens that might result from mail order sellers having to comply with the use tax laws of all state and local jurisdictions nationwide. The suggestion of "6,000 plus" taxing jurisdictions placed before this Court by Quill and its *amici* was misleading and made to raise the specter of 6000 separate returns on 6000 different tax bases.[2] The practical reality of nationwide use tax compliance is far more benign.

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[2] *Quill*, 112 S.Ct. at 1913, fn. 6. In *Quill*, the number of jurisdictions in the United States levying sales and use taxes was variously suggested to the Court as "approximately 6500 jurisdictions" Brief of Petitioner Quill at 36; "45 states and 7000 local governments" *Id.* at 39; and "45 states (plus the District of Columbia) and over 6,100 local governments." Brief of *Amicus* Direct Marketing Association at 16.

For example, even if a nationwide mail order business were to have a requisite nexus with every state and every local taxing jurisdiction throughout the United States, it would be required to file a maximum of *230*, not *6,000 plus*, use tax returns during any tax period. This is because in 20 states there are *no* local government use taxes and in another 20 the state administers all local use taxes and the local use tax reporting occurs as part of the state return; the remaining 7 states – Alabama, Alaska, Arizona, Colorado, Idaho, Louisiana and Minnesota – account for over 80 percent (190) of the 230 use tax returns that would be required to be filed nationwide.[3]

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[3] No local sales or use taxes are imposed in Connecticut, the District of Columbia, Hawaii, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Vermont, or West Virginia. NATIONAL SALES TAX RATE DIRECTORY (Vertex, Inc.)(1994). Local sales taxes are imposed but no local use taxes are permitted in Illinois, Iowa, Kansas, Mississippi, Missouri, New Mexico, and Pennsylvania. *Id.* In Arkansas, California, Florida, Georgia, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming the state administers all local use taxes. *Id.* Thus, in each of these 40 states, the mail-order seller with a duty to collect all local use taxes files just one return. The remaining states, Alabama, Alaska, Arizona, Colorado, Idaho, Louisiana, and Minnesota permit at least some jurisdictions to administer their own use taxes. There are 65 such jurisdictions in Alabama, 10 in Alaska, 9 in Arizona, 32 in Colorado, 3 in Idaho, 64 in Louisiana, and 1 in Minnesota. *Id.* If these numbers are added to the previously cited 40 returns in the one-return-per-state states and the state-level returns in these states are also accounted for (taking into account that the State of Alaska

While the maximum potential administrative burden of filing 230 tax returns on a monthly or quarterly basis is certainly manageable and many interstate sellers do so regularly, this filing duty should not be ignored or unduly minimized. Even though the smaller-sized mail order businesses would not be filing in all taxing jurisdictions, the compliance costs for these mail order companies can be significant in relation to the potential revenues to be collected. The Missouri General Assembly did its part to address the concern for the out-of-state sellers' compliance burdens by adopting a uniform, statewide use tax rate for its local jurisdictions and removing even the potential for requiring such sellers to track shipments into and rates in Missouri's 1,573 local jurisdictions.

Compliance with a local use tax collection duty by both in-state and out-of-state sellers of taxable goods generally requires that (i) the local tax-levying jurisdiction(s) overlaying the destination of the shipment be identified, (ii) the use tax rate(s) applicable to the transferred goods be identified, (iii) the tax on the transaction be calculated and collected from the purchaser, (iv) the tax due to each individual local jurisdiction on the transactions be summed at the end of the reporting period and the sum be entered at the appropriate place on the

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does not levy a sales tax), a grand total of 230 returns is obtained. See also: John L. Mikesell & Mark D. Brown, *How Big Is the Local Use Tax Problem for Mail-Order Vendors?*, 3 STATE TAX NOTES 309 (August 31, 1992).

periodic tax return, (v) the tax return be timely filed, and (vi) the tax due be remitted.[4] The Missouri General Assembly, by its enactment of § 144.748, even removes from the out-of-state seller's duties, steps (i), (ii) and (iv) – the identification and calculation of local use taxes on a jurisdiction-by-jurisdiction basis – because the uniform use tax rate of 1.5% applies in all local jurisdictions. The very steps characterized as overly burdensome by mail order industry representatives in their submissions to the Court in the *Bellas Hess* and *Quill* cases were eliminated by Missouri. In doing so, mathematical precision and identical treatment between in-state and out-of-state sellers was sacrificed to a limited extent. The result is that, with respect to 93.14% of the sales transactions that would occur in the state, in-state retailers had to collect sales tax at rates equal to or greater than the use tax rates that out-of-state sellers would have had to collect on identical transactions. The complaint here is not that in-state sellers were being discriminated against by having to collect state and local sales tax

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[4] Modern computer capabilities and computer support services can effectively respond to these compliance requirements. Specialized computer software programs provide sales and use tax rate information for every tax jurisdiction in the United States and update that information monthly. These programs integrate the state and local tax rates into the direct marketer's billing systems and calculate the tax due on each sale. Finally, they automatically generate all required sales or use tax returns for each tax jurisdiction. *See* Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vanderbilt Law Review 1097 (1986).

at the same or greater rates than out-of-state sellers in 93.14% of the statewide sales transactions, but that 6.86% of the total taxable out-of-state sales would have borne a greater use tax than sales tax burden. (Brief for Petitioners at 7). Should the Commerce Clause tolerate such a disparity when, on a statewide basis, Respondents have shown that intrastate commerce bore more of a total statewide sales tax burden than the use tax burden borne by transactions in interstate commerce? For the reasons discussed below, *Amicus* MTC submits that the Commerce Clause has the capacity for such tolerance under the circumstances of this case.

C. Where a Challenged Tax Statute Does Not Discriminate Against Interstate Commerce Beyond a *De Minimis* Amount, No Violation of the Interstate Commerce Clause Occurs.

As noted above and as demonstrated by Respondents, there has been no case made out for any discrimination against interstate commerce under these circumstances. However, should the Court conclude there were sufficient disparity of local government tax rates to require further analysis, that analysis should result in upholding Missouri's use tax system. Where, as here, a challenged tax system has not been adopted as an act of "economic protectionism" and operates, in general, to benefit interstate commerce when viewed on a

statewide basis, the Court, in determining compliance with the Commerce Clause, should take into account (i) the problems sought to be addressed by the State Legislature, (ii) the practical operation of the tax, and (iii) the degree to which interstate commerce is subjected to any burden or discrimination. This Court has early on limited its invalidation of state regulatory and tax statutes under the dormant Commerce Clause to circumstances in which the statute subjects interstate commerce to interference with the power of Congress to regulate commerce among the several States. See, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In an early tax case, *Hump Hairpin Co. v. Emmerson*, 258 U.S. 290, 295 (1922), the Court noted that the burden imposed must be one that "amount[s] to a genuine and substantial regulation of, or restraint upon [interstate commerce] [and not] whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it." It is the "operation and effect of the statute as applied and enforced by the State" that is the principle focal point. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 476 (1932). In upholding a gas consumption tax that was arguably discriminatory on its face, this Court has said:

> "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with *substantial distinctions and real injuries. Shaffer v. Carter*, 252 U.S. 37, 55. . . . Appellants have

the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have not sustained. They have failed to show that whatever distinction existed in form, there was any *substantial discrimination in fact*. *Id.* at 481-2 (emphasis added).

In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the Court dealt with a tax system analogous to that presented in this case. There, the Court upheld a Louisiana "in lieu" 25-mill property tax payable on non-resident tank cars used to transport oil in interstate commerce. Payment of the in lieu tax exempted the non-residents from local government property taxes imposed throughout the Louisiana parishes and municipalities. The statewide local property tax rate was found to average "approximately" 25 mills and, since the questioned tax was considered by the Court to be "*substantially the equivalent* of the local tax in lieu of which it was assessed, there was no unjust discrimination" under the Commerce Clause. *Id.* at 373 (emphasis added). In discussing the application of the Equal Protection Clause, but upholding the in lieu tax on both Equal Protection and Commerce Clause grounds, the Court reasoned that:

> *"Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against non-resident taxpayers, and in substance does not do so, it is not invalid merely because equality*

> *in its operation as compared with local taxation has not attained mathematical exactness.* In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purpose and practical operation, rather than to the minute difference between its application in practice and the application of the taxing statute or statutes to which it is complementary." *Id.* (Emphasis added).

Petitioners seek to scuttle the application of this Court's decision in *General American* by simply describing it as a "derelict hazard confusing lower courts" and suggesting that the case "either be moored to its facts or sunk." (Brief for Petitioners at 29). In this regard, Petitioners bring to mind the similar plea that Captain Ahab likely uttered as Moby Dick began its final dive to the deep – "Someone, please cut me loose from this big whale or I am lost!". No matter how hard Petitioners would wish to be cut loose from the principles set forth in *General American*, mere wishing will not make it so. A review of all of the facts and circumstances of the adoption of Missouri's local use tax statute and its practical effect shows that any discrimination that may possibly exist falls way short of being genuine and substantial.

D. The Court Should Apply a Contextual Balancing Inquiry Where Discrimination Against Interstate Commerce Exists, but Where There Has Been No Legislative Purpose To Promote Economic Protectionism

In circumstances in which a state legislature had enacted a discriminatory tax statute, one of the purposes of which was "economic protectionism" for its local businesses, this Court has, in the interest of advancing the important principles underlying the Commerce Clause, held that the inquiry ended right there and the discriminatory tax was invalidated. See, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Where, however, a discriminatory tax statute is shown to have been adopted in the service of legitimate state interests, then a contextual balancing approach – one that weighs the state interests against the effect on interstate commerce and asks whether reasonable alternatives were available for protecting those state interests – remains appropriate. As discussed below, the Court's recent decisions provide ample support for applying the more flexible, balancing approach under the facts of this case.

Petitioners' reliance on cases such as *New Energy Co. of Indiana v. Limbach*, 486 U.S. 263 (1984) and *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct. 2009 (1992), for the suggestion that no contextual balancing is permitted here is not only misplaced, but those cases suggest quite

the opposite is true. The rule this Court should apply here is one that recognizes that where economic protectionism was not intended by the legislature, the Court may take into consideration whether a legitimate state interest is advanced by the challenged measure and, if so, whether reasonable non-discriminatory alternatives were available to the state. Where, as here, competitive equality with reduced administrative burdens were the state's goals, not the protection of in-state businesses, there should be no violation of the Commerce Clause if no reasonable, non-discriminatory measures were available to obtain the legislative goals.

1. There is No Economic Protectionism Here

In *Bacchus*, this Court found that the challenged state tax exemption resulted from "economic protectionism" based upon both its discriminatory purpose and discriminatory effect. *Bacchus*, 468 U.S. at 270. There, the Court clearly indicated that since the enactment of the discriminatory tax statute was motivated by economic protectionism (to aid Hawaiian industry), no balancing of interests would be engaged in by the approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." *Id.*

Unlike the circumstances in *Bacchus*, here there was no discriminatory purpose in the adoption of Missouri's local use tax. The tax operates, in the

main, to provide a complement to the state's local sales tax system, even though precise mathematical equivalence or absolute equality did not result between all in-state and out-of-state transactions. The purpose underlying the legislation was to reduce the degree of tilt in the playing field of tax burdens between in-state and out-of-state transactions while, at the same time, to reduce administrative complexities on out-of-state transactions. See, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). These are legitimate state concerns. Therefore, substantial equality, not precise mathematical equivalency should satisfy Commerce Clause requirements; and no *per se* rule should apply to invalidate Missouri's efforts here.

2. Even Should Missouri's Use Tax System be Found Discriminatory, It Remains Constitutional Where, Even Under Strict Scrutiny, It is Shown to Advance a Legitimate State Interest and No Non-Discriminatory Measures are Otherwise Available

If the Court determines the tax effects of an allegedly discriminatory tax statute has a "genuine and substantial" and not an "incidental or remote" effect upon interstate commerce, that should not end the inquiry. In *New Energy Co.*, this Court articulated the principle that where a tax or regulatory measure is not enacted with a purpose to disadvantage interstate interests, that measure may

still be valid. Noting that such a measure will be subject to the strictest of scrutiny, the Court stated:

> "Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. . . . This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense – that is, a protectionist enactment – may on closer analysis not be so. However it be put, the standards for such justification are high." (Citations omitted). *Id.* at 278.

In *Chemical Waste Management*, this Court addressed the discriminatory aspects of a state imposed fee for the in-state disposal of hazardous waste generated outside the state. The Court again provided the opportunity to the state to advance justification for the facially discriminatory statute by providing that:

> "[b]ecause the additional fee discriminated both on its face and in practical effect, the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' " *Id.* at 2014.

In finding other non-discriminatory measures available to the state to protect the safety and health of Alabama citizens, the Court struck down the measure as violative of the Commerce Clause prohibition against discrimination against interstate commerce. Quoting the test it recently reiterated in *Wyoming v. Oklahoma*, 502 U.S. ___, 112 S.Ct. 789, 801 (1992), the Court concluded that the State failed to carry its burden of showing that "the discrimination is demonstrably justified by a valid factor unrelated to economic protections." *Chemical Waste* at 2015. See also, *Kraft General Foods, Inc. v. Iowa Dep't. of Revenue and Finance*, ___ U.S. ___, 112 S.Ct. 2365 (1992).

Petitioners rely on *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) and *Ft. Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources*, 112 S.Ct. 2019 (1992) to support their opposition to Missouri's sales/use tax system. In *Halliburton Oil*, the Court invalidated a Louisiana use tax which included in its base certain transactions that were not included in the sales tax base. This discrepancy created the effect of favoring all in-state sales of certain goods over all out-of-state sales of the same goods. Hence, the Court held that the statute was unconstitutional under the Commerce Clause. In *Ft. Gratiot*, the state enacted a statute that prohibited solid waste generated in another county, state, or country from being accepted for disposal, unless explicitly authorized in the receiving county's plan. Therefore, the statute discriminated based upon the origin of the

waste being from out-of-state. Ft. Gratiot challenged the statute as discriminating against interstate commerce and the Court invalidated the statute on that ground.

Halliburton Oil and *Ft. Gratiot* can be distinguished from the facts here, since the Missouri statute was not enacted with a purpose to favor in-state transactions over those in interstate commerce; Missouri's local use tax system discriminates, if at all, against *in-state* transactions on a statewide basis; and it results in greatly reduced compliance costs for interstate sellers required to collect Missouri's use taxes. As indicated above, the state merely attempted to comply with this Court's concerns in *Bellas Hess* over the compliance burdens faced by multijurisdictional corporations. As a result, the Missouri "in lieu" use tax should be viewed as serving legitimate state interests.

3. No Reasonable Non-Discriminatory Alternative Method Is Available to Secure the Legitimate Interests Sought to be Obtained by Missouri's Local Government Use Tax Law.

The Missouri law challenged here was designed to serve several interests at the same time – (1) to bring the overall sales/use tax burden between in-state and out-of-state transactions closer together by closing a local government use tax hole in its tax system; (2) to substantially reduce the compliance burdens associated with the collection

of local government use taxes – all while (leaving its local governments with some authority to impose local sales taxes. Petitioners suggest three alternatives to what Missouri has enacted. (Brief of Petitioners at 28, fn. 16.) None of the alternatives they set forth reasonably deal with Missouri's concerns. One suggestion is for Missouri to follow those states that impose statewide sales taxes and statewide use taxes at the same rate. This alternative would require the Missouri legislature to preempt the system that is in existence that permits local government discretion and control over raising their own revenue through the use of local sales taxes. The other two alternatives suggested by Petitioners would result in a myriad of local use tax rates being adopted throughout Missouri's 1,573 local government taxing jurisdictions. As noted by this Court in other state tax contexts – states need only adopt "realistic legislative solution[s]" and are not required to "adopt a tax which would 'pose genuine administrative burdens' ". *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989)(quoting from *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987)). Like Petitioners here, *Amicus* MTC does not have any reasonable alternative to Missouri's to offer the Court that would meet all of the legitimate concerns sought to be addressed by Missouri. Missouri's local use tax system should not be invalidated under these circumstances.

II. THE COURT'S DECISION IN THIS MATTER WILL BEAR GREATLY UPON THE ABILITY OF THE STATES TO ADDRESS THE PROBLEM OF USE TAX COLLECTION ON MAIL ORDER SALES SHOULD CONGRESS NOT ACT TO PASS PENDING LEGISLATION

As indicated by the *General American* case, the notion of a uniform statewide tax rate that would replace or be "in lieu" of a myriad of local tax rates is at least 70 years old in the property tax area. Over the past several years, the states and others have attempted to introduce the "in lieu" local use tax concept on a national level to address the compliance burdens complained of by the direct marketing industry. The list of Congressional bills introduced on the subject are set forth in the Court's opinion in *Quill*, 504 U.S. ___, 112 S.Ct. 1904, 1916, fn. 11. Several of these bills (e.g., H.R. 2230, 101st Congress) contained provisions for uniform statewide fees in lieu of local use taxes. In the face of a blizzard of mail orchestrated by the Direct Marketing Association, these earlier efforts to obtain federal legislation failed.

The Court in *Quill* has suggested that Congressional failure to address the use tax problem with mail order sellers "may have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits the States from imposing such taxes, but today we have put that problem to rest." *Id.* at 1916. As a result of this Court's suggestion, the states and others are once again before

Congress in an effort to require the larger interstate sellers over whom the states have taxing jurisdiction consistent with the Due Process Clause, to collect the state level use taxes and certain local government use taxes from their in-state customers. For the bill introduced by Senator Dale Bumpers of Arkansas on February 3, 1994, see S. 1825, 103d Cong., 2nd Sess., Cong. Rec. S802 – 806 (February 3, 1994).

Amicus Commission would like to believe, as this Court suggested in *Quill*, that Congressional reluctance to pass earlier legislation may have resulted from Congress' respect for its holding in *Bellas Hess*. If such is the case, Congressional action in this matter may now be determined by what is fair and reasonable as a matter of public policy. If such is the case, S. 1825 will surely pass in some form and authorize states to adopt its uniform "in lieu fee" approach to deal with the compliance burdens that are claimed to be inherent in the collection of local government use taxes. Passage of the pending federal legislation will permit interstate sellers to concern themselves with only one tax rate in each of the 47 states that impose state and/or local sales and use taxes; and, therefore, the Commerce Clause concerns addressed in *Bellas Hess* and *Quill* would be resolved by Congressional action.

However, let us assume that what is fair and reasonable as a matter of public policy again does not prevail in Congress, as not all fair and reasonable measures are enacted. The competitive transactional tax imbalance in favor of out-of-state sellers

and the compliance burdens faced by some, but not all out-of-state sellers, will remain in place. The states will have no effective means to achieve either tax parity or compliance, unless they are permitted to bring these issues back to the Court in some fashion. This Court has alluded to the possibility of re-examining its Commerce Clause holding in *Quill* after Congress has been given an opportunity to act in this matter. There the Court stated that:

> " . . . Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes. Indeed, even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence, 'this very fact [might] giv[e us] pause and counse[l] withholding our hand at least for now." *Quill*, 504 U.S. ___, 112 S.Ct. 1916.

However, after *Quill*, it will be the rare State Tax Administrator (one who is either a daredevil at heart or clearly judgment-proof) that will press the matter again. Even though this Court quite appropriately denied the Petition for *Writ of Certiorari* in *State v. Quill*, 500 N.W.2d 196, *cert. denied*, 114 S.Ct. 173 (1993), on the issue of awarding attorney's fees under the Civil Rights Act, that denial of review will not provide sufficient enough support and comfort to State Tax Administrators, their counsel and State Attorneys General to overcome the biting chill currently produced by 42 USC §§1983 and 1988 and *Dennis v. Higgins*, 498 U.S. 439 (1991). The

51 State Tax Administrators form a relatively small and well-informed community. They have certainly not failed to take notice of cases, such as *Swanson v. Powers*, 937 F. 2d 965 (4th Cir. 1991), in which a *personal* judgment was awarded in the trial court (although later reversed) in the amount of $140,000,000 against the Secretary of the North Carolina Department of Revenue for collecting a tax this Court subsequently held violative of the intergovernmental tax immunity act (4 USC 111) in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989).

In most, if not all states, legislative enactments are presumed valid and, therefore, are required to be enforced by State Tax Administrators. Where reasonable persons might differ as to the constitutionality of a newly enacted tax statute, a great amount of pressure on State Tax Administrators develops from the interplay between the duty to enforce the law and the potential for personal liability for damages and/or attorneys' fees. The State Tax Administrators are placed squarely between the proverbial "rock" of their legislatures and the "hard place" of recent-evolving Commerce Clause jurisprudence (which has become a lot less forgiving). Given the great changes occurring in the national and international economy and the disappearance of state and national commercial boundaries, state tax enactments that are intended to bring parity to the taxation of in-state and out-of-

state competitors, as well as to reduce tax compliance burdens, should be encouraged, not discouraged. Missouri's enactment here is one such meritorious effort that should be approved by this Court.

Because State Tax Administrators currently operate in a very litigious environment when they attempt to collect taxes due from well-financed national and multinational businesses, the ruling in this case will be a most crucial signal from the Court. Absent Congressional action adopting a solution to the mail-order problem, the states will be left with a weak foundation upon which to build any effective use tax collection compliance from an ever-increasing segment of our economy – the out-of-state sellers. Some states may try to adopt, as Missouri did here, appropriate measures designed to end the reverse tax discrimination against its in-state sellers and, at the same time, to try reducing the burdens of complying with local government use tax laws. Such measures may provide a reasonable alternative ground between requiring mail order sellers to collect all locally-imposed use taxes and the *status quo*, which exempts a large part of out-of-state sellers from collection responsibility. Such measures would substantially relieve local retailers from their current competitive disadvantage and would permit the states centralized collection of needed and lawfully owed revenue.

Had this Court been faced with an acceptable statewide, uniform in lieu local government use tax system in *Quill*, this Court could reasonably have found the burden on interstate commerce to have been well within tolerable limits and, therefore, not in violation of the dormant Commerce Clause. Therefore it is most vital that the Court's opinion in this case either clearly approve the Missouri use tax system or clearly approve the concept of an in lieu measure with regard to local government use taxes. A state could then more intelligently attempt to fashion an appropriate in-lieu measure and a State Tax Administrator wishing to bring this issue back before this Court could then more freely and fairly seek to enforce state and local use tax collection from interstate sellers, even those with only an in-state "economic presence". It is this opportunity for further review and articulation of the Court's *Quill* holding that should be left available to the states under the Court's ruling in this case.

CONCLUSION

For the reasons set forth above, Missouri's in-lieu local use tax system is consistent with the Commerce Clause and, therefore, the decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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No. 93-397

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and
ALUMAX FOILS, INC.,
Petitioners.

v.

JANETTE M. LOHMAN, Director of Revenue, and
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GARY MARKENSON, THE MISSOURI ASSOCIATION OF
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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether a party which has not alleged any injury resulting from discrepancies between applicable sales and use tax rates within individual taxing jurisdictions has standing to challenge a state tax statute on the ground that those discrepancies violate the Commerce Clause.

2. Whether a statewide use tax which is designed to compensate for varying sales tax rates imposed by local governments throughout the State and which is set at a level well below the average local sales tax rate applied to in-state sales, but which exceeds the lowest local sales tax rate available in the State, discriminates against interstate commerce.

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INTEREST OF THE AMICI

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal

issues that affect state and local governments. Because state and local taxing authority is central to governance and state sovereignty, *see Department of Revenue v. ACF Indus., Inc.*, 62 U.S.L.W. 4097, 4100 (U.S. Jan. 24, 1994), constitutional challenges to the exercise of such authority raise issues of great importance to *amici*.

This case implicates the capacity of States to vest discretionary taxing authority in cities and counties, and the ability of those cities and counties to exercise that authority pursuant to local democratic decisionmaking. Local sales taxes are an increasingly important source of revenue for cities and counties. In fiscal year 1991, local governments in 31 States and the District of Columbia collected general sales taxes totalling over twenty-two billion dollars; this represented the second most important source of local tax revenue that year, with only the property tax generating more revenue. 2 Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism: 1993* Table 59 at 114-15.

Because the imposition of some form of compensatory local use tax is generally necessary to make local taxing authority meaningful and viable for local governments that elect to impose sales taxes, most States authorizing local sales taxes also provide for some sort of local use tax. *See* J.A. 35 ¶ 15 (Stipulation of Facts) ("[a]s of December 31, 1991, twenty-eight states other than Missouri authorized some form of local use tax"); *see generally* American Bar Association Section of Taxation, *ABA Sales & Use Tax Desk Book: 1992-93 Edition* (D. Michael Young & John T. Piper, eds. 1993) (detailing the sales and use tax schemes in each State). Because the issues raised in this case potentially implicate all such local sales and use tax schemes, *amici* submit this brief to assist the Court in its resolution of the case.[1]

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt respondents' statements of the case and set forth only the following facts of direct relevance to *amici*'s argument.

Missouri law authorizes cities and counties to impose local sales taxes in varying amounts, Pet. App. A-3, but until recently there was no additional use tax to compensate for the sales taxes imposed at the local level. As a result, Missouri's scheme taxed the in-state purchase of an item within any local jurisdiction electing to impose a local sales tax more heavily than the purchase of the identical item from an out-of-state vendor, thereby creating an unfair advantage for out-of-state sellers.

In an effort to redress this imbalance, Missouri enacted RSMo. § 144.748, which provides for the imposition of an additional compensatory use tax of 1.5% statewide ("compensatory use tax"). This compensatory use tax was designed to compensate for the local sales taxes imposed by the local taxing jurisdictions. However, because not all cities and counties have chosen to impose a local sales tax of precisely 1.5% (or, indeed, any local sales tax at all), the compensatory use tax is lower than the local sales tax in some jurisdictions and higher than the local sales tax in others. *See* J.A. 66. Because the vast majority of in-state purchases occur within jurisdictions in which the local sales tax is greater than or equal to 1.5%, the statutory scheme places a higher overall burden on in-state commerce than it does on interstate commerce. *See* Pet. App. A-17.

Based on the fact that the local sales tax within some jurisdictions is lower than the 1.5% compensatory use tax, petitioners brought this Commerce Clause challenge. Petitioner Alumax Foils, Inc. and members of petitioner Associated Industries of Missouri (a trade association) do business in Missouri and are required to pay sales and use taxes on items purchased and used within the State.

J.A. 33 ¶ 4. In addition, some members of petitioner Associated Industries are headquartered in other States, and are required to collect and remit use taxes for items sold across state lines to Missouri customers. *Id.* Neither petitioner has asserted that it or its members have a place of business within any local taxing jurisdiction in Missouri in which the local sales tax is lower than the compensatory use tax. According to stipulation, petitioner Alumax, which is headquartered in St. Louis, has purchased goods from a vendor in St. Francois County, a county in which the local sales tax is less than 1.5%. J.A. 33 ¶ 5.

SUMMARY OF ARGUMENT

Missouri, like a majority of States, has made a legislative choice that is unquestionably within its sovereign power—to afford local governments independent, discretionary authority to levy local sales taxes. Prior to Missouri's enactment of the compensatory use tax at issue here, local governments' exercise of this sales tax authority created a competitive advantage for out-of-state vendors at the expense of local business. *See* Pet. App. A-25; J.A. 95-97. By enacting the compensatory use tax, set at a level well below the average local sales tax imposed on sales within the State, Missouri has sought to "erase"—at least partially—this "tax incentive to engage in interstate commerce." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 243 (1987).

Petitioners' constitutional challenge to Missouri's compensatory local use tax is without merit for two reasons.

1. Petitioners lack standing to bring this Commerce Clause challenge. Their action is narrowly based on the asserted unconstitutionality of discrepancies between local sales and use tax rates within certain of Missouri's taxing jurisdictions. Petitioners have not, however, alleged any injury resulting from those discrepancies.

The injury which petitioners allege is their liability for Missouri's compensatory use tax. But liability for a tax does not in itself constitute a cognizable injury, unless the imposition of the tax violates "a legally protected interest." *See, e.g., Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (injury to a "legally protected interest" is part of the "irreducible constitutional minimum" of standing"). Petitioners have not alleged that they have suffered any injury from the feature of the statute's operation which forms the basis for their constitutional challenge—the fact that the compensatory local use tax exceeds the local sales tax within certain of Missouri's local taxing jurisdictions.

Significantly, petitioners have elected not to broadly challenge the power of States to enact local use taxes which compensate for varying local sales tax rates. On the contrary, petitioners have acknowledged the constitutional validity of the sales and use tax systems of numerous other States, including those which provide for identical local sales and use taxes within each local taxing jurisdiction. *See* Pet. Br. 28 & n.16. By doing so, petitioners have implicitly conceded that Missouri's compensatory local use tax operates in a constitutionally unobjectionable manner in all taxing jurisdictions in which the local sales tax is equal to or greater than the 1.5% compensatory local use tax.

Petitioners have never alleged that their liability for Missouri's compensatory use tax has arisen within a jurisdiction in which the compensatory local use tax was higher than the local sales tax, nor have they presented any other allegations that would indicate that discrepancies between sales and use taxes within those jurisdictions have injured or will injure them. Although petitioners present a number of simplistic hypotheticals, they have made no factual allegations that would demonstrate cognizable injury to themselves, or that would trace that injury to the assertedly unconstitutional discrepancies in

sales and use taxes produced by the Missouri compensatory use tax statute. Petitioners do not have standing to challenge an aspect of a statute's operation that does not cause them any harm simply because other, concededly constitutional aspects of that same statute are costly for them.

2. Even if the Court were to find that petitioners have standing, however, their Commerce Clause challenge cannot succeed. The compensatory local use tax challenged here is clearly one that accomplishes the permissible purpose of "eras[ing] a tax incentive to engage in interstate commerce," not one that "affirmatively place[s] interstate commerce at a disadvantage." *See Tyler Pipe*, 483 U.S. at 243. Indeed, Missouri has selected a compensatory use tax rate that continues to afford interstate commerce as a whole an advantage over in-state commerce. *See* Pet. App. A-17.

Petitioners' legal argument to the contrary turns on a faulty premise which has been soundly rejected by this Court—that discrimination in interstate commerce can be judged by looking at individual tax transactions in isolation. *See General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). Moreover, the fact that petitioners do not point to a single interstate transaction in which they were disadvantaged by the tax discrepancies they challenge makes their proposed "transaction by transaction" test even more strikingly inappropriate as a measure of the Missouri statute's validity. *See Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 542 (1969). Once petitioners' faulty vision of "discrimination" is stripped away, it is clear that Missouri's compensatory use tax statute does not discriminate against interstate commerce. Instead, Missouri has done precisely what the Court has expressly endorsed as constitutionally valid—make interstate commerce pay some measure of its "fair share." *See, e.g., N.W. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959).

In arguing that a statute is always doomed if one can imagine a single instance in which interstate commerce is burdened more heavily than in-state commerce, petitioners ignore two important doctrines that this Court has consistently relied upon in assessing discrimination. First, the Court assesses discrimination by looking at the practical operation of the statute as a whole, rather than by isolating the potential effect on individual transactions or even individual interstate firms. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Second, the Court has recognized that some imprecision in the setting of tax burdens is permissible where complete precision is impossible and important state interests are at stake. *See* cases cited in Part II.B, *infra*.

Here, Missouri's statute clearly does not, in its practical operation, discriminate against interstate commerce. Pet. App. A-17. Moreover, the State's interests could hardly be more important—or more difficult to attain without some degree of imprecision. Given the Court's historical deference to state legislative choices of taxation methods, *see, e.g., Department of Revenue v. ACF Indus., Inc.*, 62 U.S.L.W. 4097, 4100 (U.S. Jan. 24, 1994), Missouri's compensatory use tax should be upheld.

ARGUMENT

I. PETITIONERS DO NOT HAVE STANDING TO RAISE THIS CHALLENGE TO THE CONSTITUTIONALITY OF THE MISSOURI USE TAX BECAUSE THEY HAVE ALLEGED NO INJURY RESULTING FROM THE ASSERTED DISCRIMINATION IN TAX TREATMENT

The injury of which petitioners complain is their liability for Missouri's compensatory use tax, both as Missouri purchasers of out-of-state goods, and, in the case of certain members of Associated Industries, as out-of-state vendors who must collect and remit use taxes for sales to Missouri customers. Pet. Br. 4-5. Without question, petitioners would be advantaged financially if the local use tax law had not been enacted. *See* J.A. 34 ¶ 8 (stipulation that compliance with compensatory use tax will impose "significant economic costs" on petitioners). They have not, however, made factual allegations of injury traceable to the assertedly unconstitutional operation of the statute, and therefore lack standing to bring this constitutional challenge.[2]

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[2] The fact that the Missouri Supreme Court found the petitioners to have standing is not binding here, since the "constitutional and prudential considerations" which comprise federal standing doctrine "respond to concerns that are peculiarly federal in nature." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977). The Court has expressly held that, even if a state court is willing to "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory," the Court's "own jurisdiction is cast in terms of 'case or controversy,' [and] we cannot accept as the basis for review . . . any procedure which does not constitute such." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

A. Petitioners' Constitutional Challenge Is Narrowly And Exclusively Focused On Discrepancies Between The Sales And Use Tax Rates Within Individual Taxing Jurisdictions

Standing doctrine requires a plaintiff to do more than identify a costly phenomenon such as the imposition of a tax; it requires the plaintiff to allege that injury to a legally protected interest has resulted (or will result) from an assertedly unconstitutional imposition of the tax. *See Lujan*, 112 S. Ct. at 2136 (setting forth elements of "irreducible constitutional minimum" of standing). In other words, there must be an injury that is both legally cognizable and "fairly traceable to the assertedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 752-53 (1984); *Lujan*, 112 S.Ct. at 2136. As a preliminary matter, therefore, it is necessary to identify with clarity the specific "assertedly unlawful conduct" complained of by petitioners.

An examination of petitioners' constitutional challenge to Missouri's sales and use tax scheme reveals that it is quite narrowly drawn, focusing exclusively on those taxing jurisdictions in which the local sales tax is lower than Missouri's compensatory use tax. Petitioners' entire Commerce Clause argument is built around repeated references to these jurisdictions, *see, e.g.*, Pet. Br. i, 10, 12, 14, 17, 26, 28, and is devoid of any indication that the operation of Missouri's compensatory use tax is constitutionally objectionable within those jurisdictions in which the use tax is equal to or lower than the prevailing local sales tax. *See* J.A. 93-94 (petitioners maintain that "the discrimination is with respect to those areas of the state where the local sales tax rate is less than the local use tax rate").

Significantly, petitioners do not question Missouri's authority to afford local governments independent, discretionary taxing authority, nor do they contest the constitutionality of compensatory local use taxes generally. Indeed, petitioners expressly acknowledge the constitu-

tionality of local sales and use tax schemes adopted by numerous other States, such as those in which cities and counties are given discretion to impose matching local sales and use taxes. *See* Pet. Br. 28 & n.16.

Nor is petitioner contesting the constitutionality of differing tax rates between jurisdictions. Petitioners describe state schemes which give local governments discretion to levy equivalent sales and use taxes as "within the clearly delineated bounds outlined in cases from this Court," Pet. Br. 28, even though differing tax rates among taxing jurisdictions are virtually inevitable under such schemes. *See generally* American Bar Association Section of Taxation, *ABA Sales and Use Tax Desk Book: 1992-93 Edition* (D. Michael Young and John T. Piper, eds. 1993) (state-by-state survey of sales and use taxes with tables indicating varying tax rates among local jurisdictions).

The asserted constitutional infirmity identified by petitioners is, therefore, an extremely narrow one: Missouri's uniform compensatory use tax results in discrepancies between local sales and use taxes *within individual taxing jurisdictions*. It is these *intra*jurisdictional discrepancies, in which the local sales tax is lower than the local use tax within the same jurisdiction, which petitioners assert are unconstitutional. Put another way, petitioners are arguing that Missouri's compensatory use tax is unconstitutional only insofar as it exceeds the local sales tax rate in certain jurisdictions.

B. Petitioners Do Not Have Standing Because They Have Not Alleged Any Cognizable Injury Resulting From The Assertedly Unconstitutional Discrepancies Between Sales and Use Taxes Within Individual Jurisdictions

As discussed above, petitioners' constitutional objection clearly does not encompass *all* impositions of Missouri's compensatory use tax; to the extent those impositions do not exceed the prevailing local sales tax in the

jurisdiction, they are implicitly conceded to be entirely proper and unobjectionable. Because of the limited scope of petitioners' constitutional challenge, their allegation that they are required to pay Missouri's compensatory use tax is inadequate to establish cognizable injury, and hence their standing.

Petitioners have not alleged that they have been or ever will be liable for the compensatory use tax within a jurisdiction in which that tax rate exceeds the local sales tax rate. *See* J.A. 7-8, ¶¶ 7-8; J.A. 33 ¶¶ 4-5; J.A. 34 ¶¶ 7-8; Pet. Br. 4-5. This is unsurprising, since use taxes are ordinarily imposed at one's business location, and petitioners have not alleged that they or Associated Industries' members are located in any jurisdiction in which Missouri's compensating use tax exceeds the local sales tax. Petitioners have not, therefore, made any allegations indicating that Missouri's compensatory use tax scheme has subjected any of their out-of-state purchases to a heavier tax burden than would be placed on the local purchase of the same goods. Nor has petitioner Associated Industries alleged that its out-of-state members have suffered any injuries attributable to intrajurisdictional discrepancies in sales and use tax rates within Missouri.[3] In the absence of any such allegations of disadvantage, there can be no basis for concluding that discrimination exists. *See Dunbar-Stanley Studios*, 393 U.S. at 542.

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[3] Associated Industries has not indicated where within Missouri its out-of-state members make sales, nor has it made any specific allegations about the impact of Missouri's compensatory use tax on its out-of-state members or their customers. *See* Resp. Br. Lohman 5 n.10. But even if members of petitioner Associated Industries had customers in jurisdictions where the compensatory local use tax exceeded the local sales tax, the harm to those members associated with possible lost sales to such customers would likely be outweighed by the effect of the advantage the Missouri tax scheme gives to out-of-state sales in all of the jurisdictions in which the use tax is lower than the sales tax.

Petitioners have failed to allege any cognizable injury that can be traced to the assertedly unconstitutional feature of the statute—the fact that it sometimes results in a higher use tax than the local sales tax within a particular jurisdiction. Because they have not alleged that the assertedly unconstitutional feature has injured them, they cannot raise this challenge to the validity of the Missouri law. *Cf. Shaffer v. Carter*, 252 U.S. 37, 57 (1920) (in challenge to tax which did not permit deduction of out-of-state losses, the Court pointed out "that there is no showing that appellant has sustained such losses, and so he is not entitled to raise this question").

Because petitioners have failed to satisfy the core constitutional requirements of standing, *see Lujan*, 112 S.Ct. at 2136, they have presented no case or controversy capable of being adjudicated in this Court.[4] Instead, they seek to challenge a statute by identifying an assertedly unconstitutional feature, without alleging that this feature has had any negative effect on them at all.[5]

[4] The causation element of the standing test also requires that the injury result from the "challenged action of the defendant, and not . . . from the independent action of some third party not before the Court." *Simon v. Eastern Ky. Wel. Rights Org.*, 426 U.S. 26, 41-42 (1976); *see also Lujan*, 112 S.Ct. at 2136. Here, the discrepancies of which petitioners complain do not result solely from the action of the respondent Director of Revenue in collecting Missouri's 1.5% local use tax; they arise *only* where that action coincides with the independent action of a local taxing jurisdiction in setting a local sales tax rate of less than 1.5%. However, it is unnecessary in this case to determine whether the action of the named defendant "caused" the discrepancies of which petitioners complain, since petitioners have failed to show that those discrepancies caused them any injury.

[5] The cases cited by petitioners in support of their standing, *see* Pet. Br. 17 n.9, are readily distinguishable. In both *Tyler Pipe*, *supra*, and *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the parties bringing the action were direct victims of the very discrimination they were challenging; they were forced to pay a tax that others similarly situated were not required to pay. Here, in contrast, petitioners have not shown that they are affected at all

Petitioners' lack of standing to challenge intrajurisdictional tax rate discrepancies becomes even clearer when the effect on petitioners of eliminating those discrepancies is considered. Petitioners have made no allegations that would indicate they would be relieved of *any* portion of their current use tax burden if the assertedly unconstitutional elements of the use tax statute were removed (*i.e.*, if local use tax rates were adjusted so that they in no case exceeded the local sales tax rate within a jurisdiction). Instead, it appears petitioners would be no better off if Missouri were required to make the local use tax in each jurisdiction precisely match the local sales tax.

It is true that petitioners would be benefitted if the declaratory and injunctive relief they seek were granted, since the complete invalidation of Missouri's compensatory use tax statute would relieve them of a tax burden and potentially improve their competitive position. In this sense, their "injury"—having to pay the tax—would be "redressed." However, there is no indication that petitioners have been or ever will be affected by anything other than concededly constitutional impositions of the compensatory use tax (*e.g.*, where tax liability for the use tax arises within a jurisdiction in which the local sales tax rate is 1.5% or greater). Consequently, the benefit they would receive from invalidation of the statute would be a windfall resulting from the judicial review process, not redress for their constitutional complaints.

The sole specific example of "injury" in the record illustrates this point. The parties have stipulated that petitioner Alumax makes purchases from a vendor located in St. Francois County, a county in which the local sales

by the assertedly unconstitutional discrepancies between tax rates of which they complain. They are forced to pay the compensatory use tax, to be sure, but they have not shown that the tax scheme has ever operated so as require them to pay a higher tax rate than that imposed on others similarly situated (*e.g.*, those within the same taxing jurisdiction who purchase goods locally, rather than from out of state).

tax is lower than Missouri's compensatory use tax. J.A. 33 ¶ 5. If Missouri were to enact new legislation that made the local use tax precisely equal to the sales tax in each and every taxing jurisdiction (a legislative scheme which petitioners have acknowledged to be constitutional, *see* Pet. Br. 28 & n.16), the local use tax in St. Francois County would be reduced to match the local sales tax there, but the local use tax in St. Louis (where Alumax is headquartered) would remain at 1.5%, since the local sales tax in St. Louis is 1.5%. There is no indication the reduced use tax in St. Francois County would have any effect on Alumax, since Alumax is not located there. Instead, the St. Louis use tax rate of 1.5% would be imposed on Alumax's out-of-state purchases. Alumax would still be in a position to buy a product in St. Francois County at a lower sales tax rate than the use tax rate applicable to its out-of-state purchase of the same product (*i.e.*, the St. Louis use tax rate of 1.5%).

Unable to demonstrate any real harm to themselves resulting from intrajurisdictional differences in sales and use tax rates, petitioners of necessity resort to the invention of hypothetical scenarios involving an imaginary cast of characters (who, not incidentally, bear no resemblance to themselves). The Court is asked to invalidate Missouri's statute because of the hypothetical plight of the "Washington apple grower [required] to charge more tax than his local counterpart on sales into Dunklin County," Pet. Br. 26, the "Kentucky merchant, shipping washing machines into Dunklin County," Pet. Br. 12, or the "Illinois mail-order house which sells a computer to a resident of Dexter or Kennett." Pet. 10. In making up their hypotheticals, petitioners have ignored the complicating factors that would arise in any real-life situation —such as the fact that these out-of-state vendors would enjoy a competitive advantage vis-a-vis their local competitors on sales into all of the cities and counties in which the local sales tax is higher than 1.5%. *See* Resp. Br. Lohman 12 n.16. These hypothetical scenarios merely

highlight petitioners' inability to allege injury to themselves sufficient to confer standing and are a patently insufficient basis for adjudicating the constitutionality of Missouri's compensatory use tax. *See, e.g., Arkansas Electric Coop. v. Arkansas Pub. Ser. Comm'n*, 461 U.S. 375, 395 (1983); *Hampton v. St. Louis*, 227 U.S. 456, 468-69 (1913).

Because the practical effects of a challenged statute are determinative in the Commerce Clause context, the theoretical potential for discrimination against interstate commerce is plainly insufficient. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), the Court explained that "[d]iscrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." *Id.* at 481. Because petitioners have alleged no injuries resulting from the asserted discrimination, there is no basis for adjudicating the Commerce Clause issues they raise. Their "unadorned speculation" about the harm that might result in hypothetical situations is plainly "not suffic[ient] to invoke the federal judicial power." *Simon*, 426 U.S. at 44.

II. MISSOURI'S COMPENSATORY USE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

A. Discrimination Under The Commerce Clause Turns On The Practical Effect Of The Statutory Scheme On Interstate Commerce As A Whole, Not On Its Possible Impact On Individual Transactions

Petitioners assert that Missouri's compensatory use tax discriminates against interstate commerce. To make this assertion, however, they must infuse the word "discrimination" with a novel "transaction by transaction" meaning. The starting point in analyzing whether Missouri's statute unconstitutionally discriminates against interstate commerce in the manner asserted by petitioners is to con-

sider the way in which the Court has defined and assessed "discrimination" in this context. This examination demonstrates that petitioners' Commerce Clause theory cannot be squared with this Court's precedents.

"Discrimination, like interstate commerce itself, is a practical conception." *Gregg Dyeing*, 286 U.S. at 481. Accordingly, the Court has repeatedly emphasized that a state taxing statute's validity under the Commerce Clause must be tested by its practical operation. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court reaffirmed its central duty where a tax is challenged under the Commerce Clause:

> "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations.

Id. at 69 (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)); *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) ("[t]he principal focus of inquiry must be the practical operation of the statute").

The Court's focus on the practical operation of challenged statutes has led it to reject Commerce Clause challenges based on formal, rather than practical, distinctions in treatment. For example, in *Gregg Dyeing* the Court held that the appellants had not sustained their burden of showing discrimination since they "failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact." 286 U.S. at 482, *quoted in Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937). *See also Halliburton Oil*, 373 U.S. at 70 ("equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions").

Related to the Court's concern with practical effects is its explicit instruction that the constitutionality of state taxes be evaluated based on the effects of the statutory scheme as a whole. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). *Cf. Washington v. United States*, 460 U.S. 540, 542 (1983) (in assessing whether tax statute improperly discriminated against federal government, Court reiterated "that a determination whether a tax is discriminatory 'requires an examination of the whole tax structure of the state' ") (citations omitted).

Ignoring these fundamental precepts, petitioners have asked the Court to adopt a novel transaction by transaction approach to assessing discrimination against interstate commerce. Their approach would require a state tax statute to be invalidated whenever a single transaction could be imagined in which a heavier tax burden would be placed on an out-of-state sale than on an in-state sale. Nothing in this Court's Commerce Clause precedents supports such an approach to the meaning of proscribed "discrimination." On the contrary, the Court assesses discrimination against interstate commerce by looking at the overall effect of a challenged statutory scheme. While it is true that even a relatively small overall effect may in some circumstances be sufficient for the invalidation of a statute, *see, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the net effect must be adverse to interstate commerce generally.

All of the cases upon which petitioners rely are distinguishable from the Missouri statute in that the discrepancies in treatment, in each and every instance in which they occurred, all had an adverse impact on interstate commerce.[6] Because there were no countervailing

[6] This is not, of course, to say that each and every transaction occurring under the challenged statutory schemes produced dis-

instances in which interstate commerce was favored, it was not necessary for the Court to engage in any balancing or weighing to determine the overall effect of the statute. The differences in treatment systemically and consistently favored in-state interests over interstate commerce, and the overall effect was unambiguously discriminatory.

Where, as here, the state scheme tends in two directions, but in net effect produces no adverse impact on interstate commerce, the Court has indicated there is no constitutionally cognizable discrimination. In *Kraft General Foods v. Iowa Dept. of Revenue*, 112 S.Ct. 2365 (1992), the Court said, in the context of a foreign Commerce Clause challenge, that "[i]f [it were] true" that "Iowa's tax system does not favor business activity in the United States *generally* over business activity abroad . . . . this would indeed suggest that the statute does not discriminate against foreign commerce." *Id.* at 2370 (emphasis added). The Court's statement in *Kraft* regarding the necessity of judging discrimination by its *general* effect is but the most recent restatement of the Court's longstanding approach to assessing the constitutionality of tax treatment. The Court had previously applied this same principle to uphold state taxation schemes squarely analogous to the one at issue here against allegations that they unconstitutionally discriminated against out-of-state interests.

In *Travellers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902), the Court affirmed the validity of a tax scheme similar to the one at issue here in the context of

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crimination—in some instances interstate commerce and in-state commerce were treated the same. *See* Br. *Am. Cur.* Wash. Legal Found. 9 n.4. But in each instance in which discrimination *did* occur, it favored in-state interests over interstate transactions. There was not, as here, any countervailing "discrimination" in favor of interstate commerce to weigh against discrimination tending in the opposite direction.

a Privileges and Immunities Clause challenge.[7] The tax statute at issue in *Travellers* imposed a uniform statewide tax rate on nonresident stockholders, but made the varying local tax rates applicable to resident stockholders. The Court upheld the tax scheme as nondiscriminatory, even though the local tax rates were in some cases higher and in some cases lower than the uniform tax rate imposed on nonresidents. Specifically rejecting exactly the type of transaction by transaction analysis petitioners advocate, the *Travellers* Court explained that "[y]ou cannot put one resident against one nonresident stockholder, and by a comparison of their different burdens determine the validity of the legislation." *Id.* at 369.

In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the Court applied a similar overall effects test to uphold another tax scheme squarely analogous to Missouri's against Commerce Clause and Equal Protection Clause challenges. There, the tax assessed on nonresidents was, taken as a whole, found to be "substantially the equivalent" of the various local taxes imposed on residents. *Id.* at 373. *See also Austin v. New Hampshire*, 420 U.S. 656, 664-65 (1975) (in the context of a Privileges and Immunities Clause challenge, Court con-

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[7] *Amici*'s references within this brief are to the Privileges and Immunities Clause contained in Article IV. The analysis contained in cases involving the Article IV Privileges and Immunities Clause can be expected to be highly instructive, if not dispositive of the Commerce Clause question presented here, given the fact that the two clauses have a common historical origin and the same core purpose. The Court has repeatedly acknowledged this closely linked history, and has used it as a basis for applying Commerce Clause analysis to Privileges and Immunities Clause questions. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (noting "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2 and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism") (footnote and citation omitted); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279-80 & nn. 7-8 (1985) (same). *See generally* Gerald Gunther, *Constitutional Law* 281-82 (12th ed. 1991).

trasted a statutory scheme whose burden "falls exclusively on the income of nonresidents [and is] not offset even approximately by other taxes imposed upon residents alone" with the one at issue in *Travellers,* in which "the nonresident . . . was called upon to make no more than his ratable contribution to the support of the state government") (footnote omitted).

Likewise, in *Dunbar-Stanley Studios*, the Court upheld taxes imposed on transient, out-of-state photographers on a city by city basis, despite the fact that those taxes could under certain circumstances exceed the tax imposed on photographers with a fixed location within the State. There, the Court found it important that the petitioner had not alleged that the system of taxation had actually worked to its disadvantage: "In none of the cities for which appellants' complaint gives the details of its activities would the transient tax imposed on it have exceeded that which a fixed-location photographer would have had to pay to operate in the city." 393 U.S. at 542. The same defect is present here as well, *see* Part I, *supra,* making it especially clear that there is no basis for using petitioners' transaction by transaction test.

The Court's Commerce Clause jurisprudence thus assesses discrimination by examining the impact of a challenged law on interstate commerce as a whole. Of course, the case law also recognizes that individuals may benefit, both as consumers and as vendors, as a result of the Commerce Clause's preclusion of Balkanization and economic warfare among the States. *See Dennis v. Higgins,* 498 U.S. 439, 449 (1991). Because individuals are among the beneficiaries of the system "fostered by the Commerce Clause," and are within the "zone of interests" protected by that Clause, the Court has held that individuals may bring a Commerce Clause action under Section 1983. *Id.* at 449-51 (citations omitted). Such a remedy is available to individuals, however, only insofar as the challenged legislation violates the substantive constitutional

limits set forth by the Court; that is, where it has an adverse impact on interstate commerce as a whole.

The fact that the Commerce Clause helps foster a constitutional system that protects individual interests does not, however, translate into the extreme substantive constitutional mandate that petitioners advocate: that any state statute which disadvantages a single individual or business, within the context of a single transaction, must therefore be invalidated without further inquiry, regardless of whether interstate commerce is adversely affected. Instead, the Commerce Clause works in conjunction with other constitutional protections, such as the Privileges and Immunities Clause and the Equal Protection Clause, to protect a system of incentives and expectations regarding trade which will benefit vendors and consumers alike.[8]

In the context of the Commerce Clause, this protection of individual expectations thus occurs as an incident to the Commerce Clause's embodiment of "the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair Canada, Inc. v. Florida Dep't of Revenue,* 477 U.S. 1, 8 (1986). Hence, the Commerce Clause's substantive protections, as set forth in this Court's decisions, operate to safeguard individuals' expectations of free access to all markets by safeguarding interstate commerce generally. This does not, however, equate to a substantive guarantee of precise equality in treatment with regard to each and every transaction in which an individual might engage.

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[8] Indeed, the Court has outlined something of a division of labor between these various constitutional provisions. *See Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 881 (1985) (Commerce Clause and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.") (footnote omitted).

Consistent with this approach, the Court has, of course, at times referred to the impact on *representative* "individuals" in testing the effects of a state statute. In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 (1977), the Court noted that "[i]n all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make the choice without regard to the tax consequences." Similarly, in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937), the Court found a sales and use tax scheme valid since "[w]hen the account is made up, the stranger from afar is subject to no greater burden than the dweller within the gates." Such illustrative examples are analytically useful where a statute's effect on one sample individual can indeed stand for the overall effect on individuals of that class generally. But looking at a statute's effect from the standpoint of a given "individual" as a way of assessing a statute's effect on interstate commerce as a whole makes little sense where various individuals and businesses are affected in different and opposing ways by the statute. Petitioners cite no case, nor are *amici* aware of any, in which the Court has ever suggested that this tool for analyzing discrimination be used in such a context, or that it be elevated to an enforceable constitutional guarantee that the burdens placed on every imaginable in-state and out-of-state transaction actually be equivalent for each and every imaginable individual or business.[9]

[9] Similar reasoning applies to the Court's statement in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." This statement cannot mean, as petitioners suggest, that the identification of a single transaction occurring across state lines which carries a heavier burden than a similar transaction within state lines leads to automatic invalidation of the statute; instead, the natural meaning of this statement, viewed in light of the Court's other pronouncements in the Commerce Clause area, is that a State may not set up a statutory scheme that operates to tax a type of transaction more heavily simply by virtue of the fact that it involves interstate commerce. Here, Missouri's burden on a type of transaction involving interstate commerce (the use of goods) is far *lighter* than the burden it places on another type of transaction occurring within state lines (the sale of goods). Pet. App. A-17.

Petitioners insist that their transaction by transaction approach to assessing discrimination is necessary, since any other rule would allow one out-of-state vendor (such as the Kentucky washing machine merchant) to be disadvantaged by the statute as long as that disadvantage was made up for by the gains of another out-of-state vendor (such as the Iowa refrigerator seller). *See* Pet. Br. 12. Even if such a disadvantaged party were properly before the Court, the Court has clearly indicated that the Commerce Clause "protects the interstate market, not particular interstate firms." *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978)); *see Arkansas Elec. Coop.*, 461 U.S. at 390 (part of "general trend in our modern Commerce Clause jurisprudence" is looking at " 'the effect of the regulation upon the *national interest* in the commerce.' ") (emphasis added) (quoting *Illinois Gas Co. v. Pub. Serv. Co.*, 314 U.S. 498, 505 (1942)). *Cf. Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940) (in assessing whether discrimination against national banking associations was present, Court held that "[d]iscrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations").

In *Exxon*, the fact that a state regulation would cause three refiners to stop selling within the State was viewed as irrelevant, since the statute had "no impact on the relative proportions of local and out-of-state goods sold in Maryland and indeed, no demonstrable effect whatsoever on the interstate flow of goods." *Id.* at 126 n.16. Hence, "[t]he fact that the burden of a state regulation falls on

some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 126. Here, as in *Exxon*, there is nothing in the record that indicates any negative effect on the flow of goods resulting from discrepancies between sales and use taxes within Missouri jurisdictions.[10]

B. The Court Has Permitted Some Imprecision In Tax Burdens Where Necessary To Advance Important State Interests

1. *States Have An Important Interest In Affording Local Governments Authority To Set Local Sales Tax Rates*

State authority over taxation lies at the core of state sovereignty. *ACF Indus.*, 62 U.S.L.W. at 4100. This authority necessarily includes state legislative choices as to whether, and in what manner, cities, towns and counties will be given independent taxing discretion. In *General American*, the Court indicated that a state legislature's decision to grant local taxing authority "is a matter within the competency of the state Legislature," and indicated that it would not concern itself "with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions." 270 U.S. at 372 (citing *Columbus Southern Ry. Co. v. Wright*, 151 U.S. 470, 475-76 (1894)); *cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973) (in context of an equal protection challenge, Court declined to "condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests," noting that to do so would

[10] Of course, some change in the movement of goods across state lines would be expected since the introduction of the compensatory use tax was designed to correct for what was previously an unfair advantage granted to interstate commerce (resulting from the much heavier burden imposed on in-state sales through the various local sales taxes).

be to "intrude in an area which [the Court] has traditionally deferred to state legislatures").

Despite the States' strong interest in granting sales tax authority to local governments (and the local governments' interest in having such authority in order to implement locally-based democratic choices), a local sales tax is typically not a meaningful option unless some compensatory local use tax can also be imposed to equalize the burdens on in-state and out-of-state transactions. Otherwise, a local electorate's choice to enact a sales tax is made only at the price of losing local business to out-of-state vendors, to whom no local sales tax need be paid. Thus, it is not surprising that most of the States which have authorized local governments to levy local sales taxes have also authorized some form of compensatory local use tax. *See* J.A. 35 ¶ 15 (stipulating that in 1991, 28 States other than Missouri provided for some sort of local use tax).

These compensatory local use taxes represent nothing more than attempts to make interstate commerce pay its "fair share"—a goal the Court has long deemed entirely legitimate. *See, e.g., N.W. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959) ("it is axiomatic that the founders did not intend to immunize such [interstate] commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State"); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.").

The State's interest in making interstate commerce pay its "fair share" is, of course, no less pressing simply because the State has elected to delegate some of its taxing authority to local governments. But, as the Court has

noted, when a state legislature chooses to do this, tax rates in the various cities, towns and counties will necessarily vary "according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government" and the democratic choices of their citizens. *Travellers,* 185 U.S. at 367. This is the desired, expected, and virtually inevitable result of granting taxing discretion to local governments. *See generally ABA Sales and Use Tax Desk Book.* The existence of these varying local tax rates complicates States' efforts to collect a "fair share" from interstate commerce.

2. *Absolute Precision As To Every Transaction Is Not Constitutionally Required Where There Is No Overall Burden on Interstate Commerce*

The Court has long recognized that making interstate commerce pay its fair share, without subjecting it to unfair or duplicative burdens, calls for practical accommodations. *See Western Live Stock,* 303 U.S. at 259. In *Western Live Stock,* the Court upheld a local tax which had an incidental impact on interstate advertising, holding that the challenged tax

> finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate commerce shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

Id. at 258.

The need for such practical accommodations is heightened where, as here, a State has chosen to vest taxing authority in local governments. For, as the Court has recognized, some imprecision in burdens is inevitable when local taxing jurisdictions adopt varying rates. As the Court explained in *Travellers,* "[i]t does not seem possible to adjust, with unerring certainty, all the varying

burdens which grow out of the fact that some of the stock of the various state corporations is held outside of the state and some within the state and the latter in separate municipalities with different rates of taxation." 185 U.S. at 369-70.

In upholding the State's tax system over the objection that some inequalities in tax burdens would remain in certain instances, the *Travellers* Court emphasized that "[a]bsolute equality in taxation can never be attained," and that "[p]erfect equality and perfect uniformity of taxation as regards individuals or corporations . . . is a dream unrealized." *Id.* at 371-72 (citations omitted).[11] In *General American,* the Court similarly concluded that imprecisions in tax burdens with respect to certain individuals or transactions were not fatal. "Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." 270 U.S. at 373. This holding is controlling here.

Moreover, in subsequent cases the Court has repeatedly indicated in related contexts that some inexactness in the imposition of tax burdens is permissible, especially where, as here, alternatives have been shown to be administratively cumbersome. For example, in *American Trucking Ass'n, Inc. v. Scheiner,* 483 U.S. 266, 296 (1987), the Court struck down a flat tax with discrimina-

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[11] *Cf. Rodriguez,* 411 U.S. at 41 ("No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact."); *Illinois Cent. R.R. Co. v. Minnesota,* 309 U.S. 157, 161 (1940) (In the context of an equal protection challenge to a tax statute, the fact "[t]hat the apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system.") (footnotes omitted).

tory effects while at the same time reaffirming that "the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." *See id.* at 296 n.26 (because of "the administrative impossibility of precise apportionment according to road use," a tax based on vehicles' fair market value was upheld "as a rough approximation of use" in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546 (1950)).

Here, Missouri has demonstrated that substantial administrative burdens would attend the use of other alternatives, such as "matching" sales and use tax rates within each jurisdiction. *See* J.A. 69-85 (Stipulation of Facts, Exh. H). But, more importantly, even if sales and use tax rates could be equalized within each jurisdiction, as petitioners suggest they should be, some inexactness in tax burdens would remain. *See* Pet. App. A-18 (citing *American Modulars Corp. v. Lindley*, 376 N.E.2d 575, 577-78 (Ohio), *cert. denied*, 439 U.S. 911 (1978)).[12] Hence, even the alternative that they endorse as constitutionally permissible would be incapable of meeting their own erroneous transaction by transaction test.

[12] In *American Modulars*, the Ohio Supreme Court struck down a local sales and use tax statute despite the fact that sales and use taxes matched within each taxing jurisdiction. The Court reasoned that the scheme violated the Commerce Clause because an individual might travel to a jurisdiction with a lower tax rate than their "home" jurisdiction and thereby make an in-state purchase that would be taxed less heavily than an out-of-state purchase would be. *See American Modulars*, 376 N.E.2d at 577 & n.5. *Amici* submit that the *American Modulars* decision is erroneous and that the tax scheme at issue there was plainly constitutional; indeed, the petitioners in this case indicate that a tax scheme which equalizes local sales and use taxes within each jurisdiction is constitutionally unobjectionable. Pet. Br. 28 & n.16. Yet, as *American Modulars* illustrates, even such constitutional schemes result in some inexactness when examined on a transaction by transaction basis.

In sum, there is no workable way for States to attain absolute precision in tax burdens with respect to all transactions, while at the same time allowing local jurisdictions meaningful taxing authority and making interstate commerce pay its "fair share." However, Missouri has selected a means of apportioning burdens which, under this Court's precedents, presents no unconstitutional discrimination against interstate commerce.[13]

Given this, it is not necessary to determine whether the alternative of matching local sales and use taxes would provide a closer (although still imperfect) approximation. The Court has repeatedly expressed its reluctance to interfere with a State's choice of taxation methods, especially where, as here, no "perfect" alternative exists. *See, e.g., Travellers*, 185 U.S. at 371. The same reasoning should govern here.

[13] Given the great importance of the State's interest in permitting local governments to exercise independent taxing authority, and the inability to achieve that goal without generating some inexactness in tax burdens, Missouri's statute should be upheld even if the Court were to find that it was discriminatory. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), the Court explained: "Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278; *see also Wyoming v. Oklahoma*, 112 S.Ct. 789, 801 (1992); *Maine v. Taylor*, 477 U.S. 131, 140-52 (1986) (upholding a state statute analyzed under this standard).

CONCLUSION

The writ of certiorari should be dismissed for lack of standing. In the alternative, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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No. 93-397

IN THE
Supreme Court of the United States
FOR ARGUMENT OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,
v.
JANETTE M. LOHMAN, DIRECTOR OF REVENUE,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, and THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE CITIES OF ST. LOUIS, JEFFERSON, KANSAS CITY, ST. CHARLES, ST. JOSEPH, SPRINGFIELD, COLUMBIA, INDEPENDENCE, JOPLIN, BRANSON, CAPE GIRARDEAU, AND LEE'S SUMMIT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF THE CITIES OF ST. LOUIS, JEFFERSON, KANSAS CITY, ST. CHARLES, ST. JOSEPH, SPRINGFIELD, COLUMBIA, INDEPENDENCE, JOPLIN, BRANSON, CAPE GIRARDEAU, AND LEE'S SUMMIT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of Respondents. Respondents have consented to the filing of this brief; their letters of consent

have been filed with the Clerk. This motion is made necessary because Petitioners have refused consent.

Amici, municipalities across the state of Missouri, have a compelling interest in the issues relating to state and local taxation presented by this case. *Amici* are among Missouri's largest and most populous cities, each at the crossroads of a significant volume of interstate and in-state commerce, and each imposing a combined city and county local sales tax equal to or higher than the supplemental use tax rate imposed by Mo. Rev. Stat. (1992) § 144.748, the statute at issue in this case. They depend heavily upon the revenue generated by Missouri's taxation system, and specifically the section 144.748 supplemental use tax. Any ruling by this Court striking down the section 144.748 use tax will severely limit *amici* in their ability to provide services necessary for the effective administration of local government, and threatens to alter the fundamental design of the tax structure each has chosen in order to provide such administration. In light of the significant and particular commercial, financial, and institutional concerns at stake, *amici* have a vested and compelling interest in ensuring that Missouri's supplemental use tax remains a viable instrument of local governance.

Accordingly, *amici* seek leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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February 24, 1994

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INTEREST OF THE *AMICI*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

For years, goods purchased in Missouri were taxed at a higher rate than the same goods purchased across the state's borders but nonetheless used and enjoyed within the state. As a result, shoppers often found it cheaper to take their business to other states and bring goods back to Missouri to use. Muncipalities, however, were deprived of the revenue accompanying in-state purchases, and local vendors lost business due to the advantage given interstate commerce by the tax structure. *See* Benton, Yes Finally, A Local Use Tax, Missouri Municipal Review, Sept. 1991.

This situation was created by the sales and use taxes in place in Missouri prior to 1992. A statewide sales tax of 4.225% was, and continues to be, levied on purchases of personal goods in the state. Mo. Rev. Stat. (1992) § 144.020; Mo. Const. Art. IV, §§ 43(a), 47(a). The sales tax is collected at the place of the sale, and (except for automobiles and boats) is uniform even when the purchaser transports the item elsewhere.

Further, since 1969, counties and municipalities have been authorized to supplement this statewide tax with additional local sales taxes.[1] Pursuant to this authority, a majority of Missouri's taxing jurisdictions have enacted such additional sales taxes through local action, including voter approval. As of the beginning of 1992, for instance, the city of Columbia had imposed an additional 1.75% in sales taxes (Record, in Supplemental Legal File at 16),

[1] *See, e.g.*, Mo. Rev. Stat. (1992) §§ 66.600-.630; 67.500-.545; 92.400-.420; 94.500-.510; 94.600-.655; 94.700-.745.

and St. Louis City added 1.5% to the statewide rate (Record, in Supplemental Legal File at 32). Moreover, since many counties also imposed supplemental sales taxes, residents in most cities (with the exception of St. Louis)[2] paid not only the municipal, but also the county sales tax. In cities like Columbia, then, citizens paid a total of 2.25% in sales tax on each purchase: 1.75% imposed by the city and .5% by Boone County (Record, in Supplemental Legal File at 16). And in cities such as Independence and St. Charles, each with a 1% municipal sales tax, the *additional* sales rates imposed respectively by Jackson and St. Charles counties resulted in a total sales tax of 1.75% and 2.5% (Record, in Supplemental Legal File at 22, 32).

In this way, people buying in the vast majority of Missouri's municipalities were required to pay not only the 4.225% statewide sales tax, but also *additional* taxes imposed by the city and/or county in which the purchase occurred. In some cities, this additional tax burden is as high as 3.5% *over and above the statewide sales tax* (App. 67). Indeed, the lower court found as fact that *in-state sales* were subject to a local sales tax burden of about $100 million *more* than the amount that would have been generated were a uniform, rather than a locally variable, sales tax of 1.5% imposed statewide (Pet. App. A-38).

[2] The city of St. Louis is not located in a county, though St. Louis county is home to more than 92 separate incorporated areas which are authorized to levy sales taxes. In addition to the county itself, which levies its own tax, at one time virtually all of these jurisdictions levied a separate sales tax, or had the prerogative to do so. To eliminate that patchwork, the local tax prerogative was withdrawn so that there would be one consolidated rate of 2% in the county (with the money collected by the county and redistributed in part back to the localities). *See* Mo. Rev. Stat. (1992) §§ 66.600-.630. In the most recent legislative session, however, a county-wide tax was essentially retained, but each of the incorporated towns or cities within the county was given the authority to levy a supplemental sales tax of .125 to .25%. Mo. Rev. Stat. (1992) § 94.850.

The localities imposing the highest additional sales taxes, such as *amici,* tend to be the most populous, drawing significant amounts of commerce and depending upon the generated revenue to support social services, maintain infrastructures, and balance finances.[3] Revenues generated from local sales taxes, which in the St. Louis area alone totaled nearly $50 million in 1993, are used not only to support general and necessary government services—for the benefit of residents and interstate visitors alike—but also for specific purposes such as the maintenance of local transit systems.[4] As of 1990, 93.14% of all Missouri's taxable sales and 73.5% of the state's population were subject to a combined local sales tax of 1.5% *or higher,* in addition to the 4.225% statewide rate, for a total of 5.725% or more (Record, in Legal File at 531, 333).[5] Specifically, *amici,* who together accounted for well over a quarter of Missouri's entire population in 1990 (Missouri Official Manual, 893-927) had

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[3] *See* Hellerstein and Hellerstein, *State and Local Taxation* 661 (5th ed. 1988) ("Municipalities and other local subdivisions of State governments have begun to rely more heavily than in the past on sales taxes to supplement the revenues from the property tax, their traditional principal source of revenue.").

[4] For example, .5% of the sales taxes imposed by the cities of Columbia and St. Louis are designated "transportation sales taxes" collected for the benefit of local transit systems (Record, in Supplemental Legal File at 16, 32).

[5] Significantly, only counties and *incorporated* municipalities have statutory authority under Missouri law to impose local sales taxes. *See* Mo. Rev. Stat. (1992) § 67.505 ("Any county may . . . impose a county sales tax . . . for the benefit of such county"); § 94.510 ("A city may . . . impose a city sales tax for the benefit of such city"); § 94.500 (defining cities as "incorporated cities" for the purposes of § 94.510). As of 1990, however, Missouri had 114 counties and 928 incorporated municipalities, for a total of 1042 taxing jurisdictions. The remainder were either *unincorporated* municipalities (260) or census designations, often with no population and unable under Missouri law to impose sales taxes of any kind (Missouri Official Manual, 893-927 (1993-94)).

each by 1992 imposed combined city and county sales taxes at a rate of 1.5% or more.[6]

In contrast to those purchasing goods in-state, people buying the same or similar goods just outside the state's borders and bringing them back to use within the state were required to pay only 4.225% pursuant to Missouri's statewide use tax. § 144.610. Instituted as a complement to the sales tax, the use tax was designed to ensure that individuals did not end-run the often higher state and local sales tax by merely purchasing goods outside the state. The 4.225% tax was, however, ill-suited to this purpose. With the additional sales taxes imposed by the majority of cities and counties, purchases made in-state were saddled with a heavier tax burden (4.225% *plus the local sales tax rates*) than those made out-of-state (4.225% only).

In 1992, the Missouri legislature instituted an "additional use tax" to supplement the 4.225% statewide use tax. § 144.748. That measure imposed an additional tax of 1.5% on all goods bought outside the state but used within Missouri, setting the statewide use tax rate at a uniform level of 5.725%. This tax is levied on interstate purchases, no matter where in the state the items purchased are ultimately used. For *amici,* each with sales taxes of 5.725% or higher, the section 144.748 use tax eliminated or mitigated the disparity of tax burdens placed on in-state and out-of-state sales. And for out-of-state vendors, charged primarily with collecting and remitting the use tax, the uniform rate eliminated the administrative nightmare of charging different rates for

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[6] *Amici* St. Louis (pop. 396,685), Kansas City (pop. 435,146), Independence (pop. 112,301), and Springfield (pop. 140,494) are the state's four most populous cities. Missouri Official Manual, 920, 909, 908, 922. The City of Branson, Missouri is one of the fastest growing municipalities in the nation. *See* Staci Kramer, Boom Town Deals With Sweet Smell of Success, Chicago Tribune, Dec. 5, 1993, at 6.

different purchases depending on the Missouri locality in which the good is used. Out-of-state vendors, under section 144.748 are not obliged to ascertain the residence of the Missouri customer, match that residence with a specific—and constantly changing—local tax, and charge the varying specified prices for different purchases. Instead, a single rate would apply to all sales for all Missouri patrons.

Revenues collected pursuant to section 144.748 are deposited by the state's director of revenue into a "Local Use Tax Fund," and are not considered part of the total state tax revenue.[7] § 144.748. Rather, these monies are redistributed only to those localities imposing local sales taxes—*i.e.*, counties and incorporated municipalities—in proportion to the total amount each collects in local sales taxes. *Id.* The *higher* the local *sales* tax, therefore, the more money each county and city would receive from the Local Use Tax Fund. The lower court found that this structure operated as an incentive for local entities to maintain or increase the rates of their local sales taxes (Pet. App. A-38). On the whole, local sales taxes generally, and those of *amici* in particular, have either remained the same or have increased since 1992.[8] Indeed, residents in each *amici* municipality are currently subject to a combined city/county sales tax at or above 1.5% *See* Multistate Sales Tax Guide (CCH) ¶ 6-150MO, 11,531-557 (1994). *Amici,* therefore, impose a greater tax burden on sales made in each municipality than on sales made outside the state, even if the goods purchased are used and enjoyed in the city in either instance.

Since the additional use tax was enacted, it has generated substantial amounts of revenue upon which municipalities like *amici* have come to rely. In 1993, over $4.8 million was distributed to the cities of St. Louis, Columbia, Independence, St. Charles, and St. Joseph alone. *Amici* have earmarked this money for important purposes. Springfield, for instance, has planned to use the revenues to expand and better equip its police force. St. Charles will use the money to reduce a deficit in the city's self-funded insurance program, and to rehire some of the city's workforce, 10% of which was cut in 1992. The city of Independence depends upon the use tax revenue to balance its budget, and denial of these funds likely will result not only in a reduction of essential government services, but also in the termination of government workers. A repeal of section 144.748 would not only shut off this expected stream of income for most counties and municipalities, but would also require these localities to pay back revenues already received under the tax. For cities like St. Louis, then, such a measure would likely result in an immediate loss of $3.1 million in expected revenue, as well as a payback of an additional $4 million.

This case, therefore, fundamentally threatens Missouri's largest cities in several respects. It threatens to place intrastate commerce, once again, at a disadvantage vis-a-vis interstate commerce by eliminating a measure which now equalizes the tax burden. It threatens to disrupt or eliminate the services Missouri's localities provide residents as well as interstate visitors by denying the requisite funds for those services. And it threatens interference with the manner by which Missouri's counties and cities tax those given the privilege of using and enjoying goods within their jurisdiction.

---

[7] 1% of the total uniform use tax revenue collected is retained by the state to compensate for collection costs.

[8] *Compare* Record, in Supplemental Legal File at 11-37 *with* Multistate Sales Tax Guide (CCH) ¶ 6-150MO, at 11,531-557 (1994).

ARGUMENT

I. MISSOURI'S ADDITIONAL USE TAX IS CONSTITUTIONAL UNDER THE STANDARD ADOPTED IN *COMPLETE AUTO TRANSIT, INC. v. BRADY*

This Court has abandoned the rigid, formalistic Commerce Clause rules which forbade state taxation of interstate commerce. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Court, in replacing this approach, emphasized the need to look past "the formal language of the tax statute [to] its practical effect" in judging its constitutional validity. In this way, as the Court has twice recently reaffirmed, the validity of a state tax on interstate commerce depends not on semantics or theorization, but on economic realities. *See Quill Corp. v. North Dakota*, —— U.S. ——, 112 S. Ct. 1904, 1912 (1992); *Trinova Corp. v. Michigan Dep't. of Treas.*, 498 U.S. 358 (1991).

Accordingly, under *Brady* a state tax on interstate commerce does not violate the Commerce Clause if (1) it is applied to an activity with a substantial nexus with the taxing state, (2) it is fairly apportioned, (3) it does not discriminate against interstate commerce, and (4) it is fairly related to services provided by the state. 430 U.S. at 279. Petitioners argue that Missouri's additional use tax violates *Brady*'s third (anti-discrimination) tenet.[9] They are wrong.

[9] In most cases, the part of the *Brady* test creating the most contention is the "fair apportionment" prong. The apportionment principle represents the Court's attempt to ensure that the "states not seek to extend their tax powers beyond their respective borders." Laurence Tribe, *American Constitutional Law* § 6-16 (2d ed. 1988). The requirement prohibits the imposition of taxes capable of repetition by many states, thus "ensur[ing] that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260 (1989). Use taxes, like the one adopted by Missouri, however, do not raise apportionment concerns since (1) the state "has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed," (*Goldberg*, 488 U.S. at 262), and (2) no other state can tax the same transaction (because Missouri provides a credit against the use tax for any sales taxes paid to other states). In this way, use taxes pass the Courts "internal" and "external" consistency requirements.

A. The Missouri Use Tax Is A Constitutional Method Of Dealing With Practical Issues Of State Taxation

The constitutionality of the basic sales-use tax structure adopted by the State of Missouri is well-settled. This Court has long held that use taxes on the privilege of using goods in-state purchased outside the state do not discriminate, facially or by effect, when they are instituted to complement taxes imposed on in-state sales. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). As a "necessary complement" (*Williams v. Vermont*, 472 U.S. 14, 24 (1985)) to tax burdens already imposed on in-state sales, use taxes effect the wholly permissible goals of "compensat[ing] the state for revenue lost when residents purchase out-of-state goods for use within the state," (*D.H. Holmes Co., Ltd.* v. *McNamara*, 486 U.S. 24, 32 (1988)) and eliminating any unfair advantage given interstate commerce over intrastate transactions by virtue of the state sales tax. *Henneford*, 300 U.S. at 583-85. So long as use taxes complement sales taxes and do not "unfairly burden[] commerce by exacting more than a just share from the interstate activity," they pass constitutional muster under this Court's Commerce Clause cases. *Washington Dep't. of Revenue v. Ass'n. of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978).

Far from discriminating against interstate commerce, Missouri's use tax was implemented to eliminate the systemic discrimination against *in-state* commerce fostered by the state and local sales tax structure. Because the tax imposed on the vast majority of in-state purchases exceeded by 1.5% or more the tax on goods bought out-of-state but used in Missouri, the tax system unfairly

and artificially rendered interstate commerce more attractive than in-state commerce. In passing the supplemental use tax, Missouri merely effected the customary and permissible purposes of use taxes generally: to compensate for needed revenue lost to more lightly taxed goods out-of-state, and to hold interstate commerce to carry its fair share—but no more—of the state and local tax burden. *Williams v. Vermont*, 472 U.S. at 24. Since "equality and not preference is the end . . . achieved," the additional use tax does not discriminate against interstate commerce, and, hence, passes constitutional muster. *Henneford*, 300 U.S. at 586 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932)).

Petitioners argue that Missouri's sales-use tax structure is unconstitutional because local variations in the sales tax rates result in a lower sales tax in certain jurisdictions than the statewide uniform use tax (Pet. Br. 14). This argument, however, ignores the very purpose of a complementary tax. Such taxes do not *duplicate* the burden placed on *in*-state commerce; they merely *complement* that burden, ensuring that no greater, but no less of, a burden is placed on *inter*state commerce. In this sense, as the Court in *Brady* held, the constitutionality of a use tax depends not on whether it matches in-state sales taxes in "form," but the extent to which its "practical effect" is a "substantially evenhanded treatment" of intrastate and interstate commerce. *See Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977). As this Court explained in *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932), "[d]iscrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with *substantial* distinctions and *real* injuries." (emphasis added).

The varying sales tax rates imposed by Missouri's localities underscores rather than frustrates the purpose of complementary taxes. Since these variations make it impossible to impose a use tax which, in "form", carbons

the sales taxes levied throughout the state, Missouri has decided upon a complementary measure which places a substantially equivalent burden on out-of-state purchases in economic "effect": over 90% of the purchases made in Missouri are saddled with a tax equal to or greater than that imposed on out-of-state sales. Indeed, each *amicus* currently taxes in-city sales at least as heavily as interstate sales, and some—including Branson and St. Charles—impose a combined local sales tax at *twice* the rate of that imposed on goods brought to the city but purchased out-of-state. Multistate Sales Tax Guide, ¶ 6-150MO, 11,533, 11,552 (1994). As the effect of the additional use tax is merely to end, or at least make less salient, the disparate treatment of in-state and out-of-state sales, that the local sales tax rates vary is constitutionally irrelevant, for the statute does not discriminate against interstate commerce.

Moreover, the remedy sought by Petitioners—the wholesale unconstitutionality of section 144.748 (the entire statewide 1.5% use tax)—would fundamentally interfere with local governance. Municipalities such as *amici* depend heavily upon revenues generated from local sales taxes as well as the additional use tax. *Amici* rely upon this revenue to fund the range of services which residents and visitors expect and demand of local government. Petitioners would deprive cities like *amici* these funds because the *form* of section 144.748 does not precisely duplicate that of the local sales taxes. But this court has recognized that "the States have large leeway in making classifications and drawing lines which in their judgment produce *reasonable* systems of taxation." *Williams v. Vermont*, 472 U.S. at 22 (emphasis added). The State of Missouri and its localities have decided upon a system of taxation which reasonably distributes a tax burden between in-state and interstate commerce, without discriminating against either. *See Goldberg v. Sweet*, 488 U.S. 252, 267 (1989) ("interstate commerce may be required to contribute to the cost of providing *all*

governmental services, including those services from which it arguably receives no direct 'benefit.'") (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981)). This decision should not be disturbed by Petitioners' elevation of form over practical economic reality.

B. *General American Tank Car Corp. v. Day* Is Controlling Precedent and Compels The Constitutionality Of Missouri's Additional Use Tax

This is not the first time this Court has had occasion to judge the constitutionality of a uniform use tax imposed as a complement to varying local sales taxes. In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the Court examined a system of taxation strikingly similar to that of Missouri and held that it raised no constitutional concerns. The *General American* holding is controlling precedent, the logic of which compels that the constitutionality of Missouri's use tax be affirmed.

At issue in *General American* was the constitutionality of a uniform statewide tax of 25 mills imposed on the rolling stock of non-resident corporations while local taxes imposed variable tax burdens on the rolling stock of resident corporations. Accordingly, as the Court explained, "in some parishes, local taxes exceed twenty-five mills and in others they are less than that amount. . . ." 270 U.S. at 371. That some parishes taxed at less than the 25 mill rate was not the focus of the Court's constitutional analysis. Rather, the Court examined whether the tax worked an *overall* discrimination against out-of-state corporations, and did not narrowly look to the disparities of particular and discrete locations. As long as the tax did not create a *general* disparity in the treatment of in-state and interstate commerce, it passed constitutional muster, for the Commerce Clause "protects the *interstate market, not particular interstate firms.*" *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 127-28 (1978) (emphasis added).

Missouri's additional use tax falls within the sweep of the *General American* standard, and thus should be held constitutional. The disparities created by the local sales taxes are constitutionally irrelevant since, overall, interstate commerce is treated no worse—and often is treated better—than in-state commerce. Because section 144.748 works no discrimination against interstate commerce, as opposed to particular firms operating in particular locations, it is not discriminatory under the Commerce Clause.

The cases cited by Petitioners do not compel a contrary result. In each of those cases, the tax at issue uniformly and consistently treated in-state transactions more favorably than interstate transactions. Accordingly, the overall effect of those taxes was to burden out-of-state commerce more heavily than in-state commerce. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), for instance, the use and sales taxes were applied to different tax bases such that the use tax was simply taxing more things than the sales tax. Thus, even though the rates imposed by both taxes were identical in form, the practical effect was that interstate commerce was taxed more heavily by the use tax than in-state commerce was by the sales tax. The tax at issue here, however, is almost the diametric opposite of the one considered in *Halliburton*: while the use and sales taxes differ in some jurisdictions in form, the *practical effect* is that the vast majority of interstate purchases are taxed at a rate equal to or *less* than that imposed on in-state purchases.

Further, in those cases cited by Petitioners, there was evidence of the kind of protectionism in favor of local interests which is prohibited by the Commerce Clause. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), for instance, the state imposed an excise tax on wholesale liquor sales which exempted locally produced liquors. The Court held that the statute was "mere protection-

ism," and hence, unconstitutional. *Id.* at 276. In this case, however, since more than 90% of Missouri's in-state sales are taxed more heavily than out-of-state sales, it is difficult to describe the state's use tax as "protectionist."

Petitioners' cases are therefore inapposite, and Missouri's additional use tax should be upheld under the doctrine articulated by the Court in *General American*.

II. *GENERAL AMERICAN* REMAINS GOOD LAW, AND IS CONSISTENT WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

General American signaled to the states and their localities a simple and understandable constitutional principle: they may resolve the practical problems which attend the creation of a complement to varying local taxes as long as the resolution works no overall discrimination against interstate commerce. Missouri, in enacting section 144.748, acted within the parameters established by *General American* in establishing a sales-use tax structure which fairly and reasonably distributes the tax burden between interstate and intrastate commerce, and upon which the state's localities have come to rely for a substantial amount of operating revenue. This Court has recently held, in the context of the Commerce Clause, that "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis*, therefore counsels adherence to settled precedent." *Quill Corp.*, 112 St. Ct. at 1916 (quoting *Runyon v. McCrary*, 427 U.S. 160, 190-191 (1976) (Stephens, J. concurring)).

Aside from considerations of *stare decisis*, *General American* should be reaffirmed because it remains consistent with this Court's Commerce Clause jurisprudence. Contrary to Petitioners' claim, this Court has not held that the constitutionality of a use tax depends on its duplication of in-state taxes for *every* transaction. Indeed, given the wide array of independent taxing authority granted a state's various localities, such a holding would compel a legislature to micromanage state and local taxation with regard to every purchase to ensure an exact match between the state use tax and the sales taxes of hundreds of counties and cities. And while the legislature could also create across-the-board uniformity by divesting the localities of their ability to tax at all—or to tax at varying rates—neither one of these measures is required by the Commerce Clause.

The Constitution requires nothing less—but nothing more—than the even-handed treatment of in-state and interstate *commerce*. The focus, therefore, is on the practical effect of the tax on a "*class*" of commerce, and not on particular, discrete markets or firms within that class. *See Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364, 367-68 (1902) (emphasis added). Absent a demonstration that the tax at issue treats the class of interstate commerce less favorably than the class of in-state commerce, there is no discrimination under the Commerce Clause. By looking to the *average* burden imposed on in-state and out-of-state corporations by the uniform and variable taxes at issue, the Court in *General American* employed a standard for resolving a unique and practical problem of state and local taxation that remains true to this Court's evolving Commerce Clause analysis. There is therefore simply no reason to overrule *General American*, and, on the contrary, every reason to reaffirm it.

CONCLUSION

The judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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